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No. 92-

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM H. DENNLER, *et al.*,

*Petitioners,*

v.

ROBERT S. TRIPPET, *et al.*,

*Respondents.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether, for purposes of the one-year limitations period of Section 13 of the Securities Act of 1933, a securities issuer's rescission offer implemented in settlement of an SEC enforcement action operates, as a matter of law, to put investors (including investors in subsequent securities offerings) on notice of a wholly distinct fraudulent scheme perpetrated by the issuer, where (a) the limited violations of law alleged by the SEC have seemingly been cured by the rescission offer prospectus, (b) no other evidence of fraud by the issuer is apparent, and (c) the jury specifically found that such investors could not with reasonable diligence have discovered the fraud until 28 months later.

2. Whether the doctrine of equitable estoppel enunciated by this Court in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), is inapplicable as a matter of law to cases subject to Section 13 of the Securities Act of 1933.

## PARTIES TO THE PROCEEDING

Petitioners in this Court are William H. Dennler, John D. Lockton, Peter G. Powers, Peter P. Luce, William D. Robertson, Thomas H. Thorner, William Grohne, Beatrice B. Warren, Joseph C. Bennett, Estate of Hoyt Ammidon, Fred J. Borch, Joseph A. Buda, Estate of Arthur M. Bueche, Estate of Thomas S. Gates, Hubert W. Gouldthorpe, Earl D. Hilburn, Joseph E. Horak, Francis K. McCune, Estate of J. Stanford Smith, and Hicks B. Waldron. The first nine petitioners named petition on their own behalf and as representatives of nine classes of investors certified by the trial court pursuant to Rule 23, Fed. R. Civ. P. Respondents in this Court (defendants-appellants below) are Robert S. Trippet, Helen E. Thomas as Personal Representative of the Estate of Frank E. Sims, Elmer M. Kunkel, Wynema A. Cross as Executrix of the Estate of Norman C. Cross, Jr., Cross & Company and Kothe & Eagleton, Inc. All other parties named in the caption of the opinions below (App. 1a-23a, App. 56a-79a) are either defendants who have settled and been dismissed or plaintiffs who were either former class representatives or whose individual claims were dismissed voluntarily before trial.

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**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

### OPINIONS BELOW

The initial opinion of the court of appeals (App. 1a-50a[1]) is reported at 939 F.2d 1420 and the order denying petitioners' motion for rehearing (App. 51a-55a) is reported at 947 F.2d 897. The opinion of the

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[1] App. refers to the separately bound appendix to this petition for a writ of certiorari.

court of appeals on remand from this Court (App. 56a-95a) is reported at ___ F.2d ___, 1992 WL 201143. The order of the court of appeals denying respondent Trippet's petition for rehearing (App. 96a-97a) is unreported and the opinion of the court of appeals denying in part and granting in part the motion for rehearing of the remaining respondents (App. 98a-108a) is reported at ___ F.2d ___, 1992 WL 300892. The order of the district court entered October 17, 1988 rejecting respondents' statute of limitations defenses (App. 109a-111a) is unreported. The final judgment of the district court entered November 16, 1989 (App. 112a-127a) is reported at [1989-90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,970.

## JURISDICTION

The decisions of the court of appeals denying rehearing and denying in part and granting rehearing in part were made on September 10, 1992, and October 23, 1992, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution; and Sections 11 and 13 of the Securities Act of 1933, 15 U.S.C. §§ 77k and 77m.

## STATEMENT

1. From 1964 through 1972, Home-Stake Production Company sold interests in annual oil and gas development programs to numerous investors

throughout the United States.[2] Each annual program was organized as a joint venture between the investors and a newly-created Home-Stake subsidiary (Joint Br., A-3, ¶¶ 69-71).[3] Home-Stake and its officers, particularly its chief executive officer, respondent Trippet, exercised complete control over these subsidiaries (Joint Br., A-3, ¶ 44). Although the subsidiaries nominally organized and operated the programs, they had no employees of their own.

Home-Stake registered with the SEC the interests offered to investors in each annual program (Joint Br., A-3, ¶ 71). The programs were sold pursuant to prospect uses that contained descriptions of mineral properties proposed to be developed, tables showing the purported results of prior programs, and audited financial statements of the offerors (Exs. RD 385-93). In addition, Home-Stake routinely furnished investors with copies of its annual reports, unregistered sales literature setting out projected investment returns, and, beginning in 1967, evaluation reports from purportedly independent petroleum geologists showing values for each annual program well in excess of its purchase price (T. 165-67, 223-25, 250-53, 1422-23; Exs. RD 1-8, RD 49-57, RD 318-83).

Unknown to investors, virtually none of the development work on any Home-Stake program ever took

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[2] Citations to the record below are as follows. A stipulation of undisputed facts among the parties, which was given to the jury, was attached to respondents' joint brief in the court of appeals and is cited as Joint Brief, A-3, ¶ ___. The trial transcript is T. ___ and trial exhibits are Ex. ___. Pleadings filed in the district court are cited by docket number as Doc. ___.

[3] The dates and amounts of program interests purchased by the petitioners herein were stipulated. Joint Br., A-3, ¶¶ 1-37.

place (T. 423-32, 464-65, 505-15, 3351-55; Exs. 250, 292, 1254), and every program lost money continuously from its inception through the date of Home-Stake's bankruptcy in September 1973 (T. 1163-71; Exs. K-37A - K-42). Nevertheless, Home-Stake sent investors quarterly checks representing their purported share of profits from oil production, secretly charging those payments to the programs' development budgets (T. 742-48, 837-38, 1165-66, 1170, 1181, 1199). By using development monies to pay investors fictitious profits, Home-Stake in substance operated an elaborate Ponzi scheme in which funds invested in one program were returned either to those investors or to investors in prior programs (T. 1184-86, 1192, 1218).

Home-Stake disclosed none of its scheme to prospective investors, to the SEC or to the IRS (which would have disallowed the intangible drilling cost deductions that Home-Stake falsely advised investors they could claim). Instead, Home-Stake continually furnished its investors with fictitious production reports, bogus descriptions of drilling activities (Exs. RD 62-296; T. 233-38, 624-25, 1417), inflated program valuations (Exs. RD 318-83), and false audited financial statements showing increased income and net worth from mineral development (Exs. RD 48-57; T. 1198-1248). Home-Stake likewise filed fraudulent registration statements annually with the SEC, showing increased payouts of nonexistent oil revenues to investors in prior programs (T. 1171-79, 1242-43).

2. In 1970 the SEC learned that Home-Stake had sold more than the registered number of interests in its 1970 Program (which was located in Venezuela) and had used, in selling those interests, an unregis-

tered "program book" containing unsupported income projections and reserve estimates (T. 1442-44, 1513-15). In February 1971, the SEC sued Home-Stake and certain of its officers and directors, including respondents Trippet and Kunkel, its then chief financial officer, alleging violations of the registration and antifraud provisions of the securities laws (Ex. RD 657). Specifically, the SEC challenged (a) the sale of more than the maximum number of 914 registered units in the 1970 Program; (b) unsupported estimates of oil reserves and future income for the 1970 Program; and (c) Home-Stake's failure to comply with an undertaking not to accept payment for units in the 1970 Program until a post-effective prospectus amendment was delivered to investors (*Id.*). Respondents Cross and Sims were not sued by the SEC and respondents Kothe & Eagleton and Cross & Company had yet to provide any services to Home-Stake as of the date of the SEC suit.

In April 1971, Home-Stake and its co-defendants agreed to settle the SEC suit by making a rescission offer to investors in the 1970 Program. The settlement was embodied in a consent decree whereby defendants agreed (a) to reduce the 1970 Program to its originally registered size; (b) to eliminate income projections for the 1970 Program and to provide a reduced reserve estimate prepared by a petroleum engineer acceptable to the SEC; (c) to circulate to investors in the 1970 Program a revised prospectus accurately describing the program and the rescission offer; and (d) not to violate the securities laws in the future (Ex. RD 659). As ordered by the district court, the rescission offer prospectus was mailed on April 30, 1971, to investors in the 1970 Program (Ex. RD 410).

Home-Stake subsequently advised the SEC that enough investors had accepted the rescission offer to reduce the 1970 Program to its originally registered size, with more than 600 investors holding $18,280,000 of interests (914 units) electing to continue their investment (Ex. RD 386 at 43, Ex. 450B).

The 1971 SEC suit contained no allegations concerning Home-Stake's 1964-1969 Programs (which were located in California, not Venezuela), no allegations concerning any aspect of the Home-Stake Ponzi scheme, and no allegation of inaccuracies in Home-Stake's audited financial statements (Ex. RD 657). (In part, this was due to false and misleading information that respondents submitted to the SEC during its investigation (T. 1046, 1063-65; Exs. 2618, 2640, 3832).) In any event, the specific wrongs the SEC had alleged—oversales of interests in, and unsupported estimates of income and reserves for, the 1970 Program alone—were purportedly cured by the rescission offer prospectus, which was accepted by the SEC and the district court as satisfying the consent decree (Exs. RD 407, RD 410, RD 659).

Between early November and late December 1971, Home-Stake registered with the SEC and sold to more than 400 investors interests in a new 1971 Program (Ex. RD 386; Ex. 450B). Between early October and late December 1972, Home-Stake registered with the SEC and sold to more than 130 investors interests in its 1972 Program (Ex. RD 385; Schedules Attached To Final Judgment entered November 16, 1989, Vol. 2, 1972 Class). The prospectuses for the 1971-1972 Programs included a brief description of the SEC action, the ensuing consent decree, and the rescission offer for the 1970 Program (Exs. RD 385, RD

386). Neither prospectus disclosed Home-Stake's Ponzi scheme, continued unabated, or the fact that Home-Stake was insolvent. (*id.*).

3. On March 30, 1973, three investors (including Ivan Anixter, the original named plaintiff) brought this securities fraud class action against Home-Stake on behalf of investors in the 1965-1971 Programs. (Originally filed in California, the case was later transferred to the United States District Court for the Northern District of Oklahoma.) (App. 25a). In September 1973, the SEC sued Home-Stake and, for the first time, alleged the existence of the Home-Stake Ponzi scheme (N.D. Okla., Case No.73-C-306, filed 9/11/73). In settlement of that SEC suit, on September 20, 1973, Home-Stake filed for reorganization under the bankruptcy laws (N.D. Okla., Case No. 73-B-922) (T. 3472). In May 1974, the *Anixter* complaint was amended by adding claims on behalf of investors in the 1964 and 1972 Programs, adding additional representative plaintiffs, and adding defendants including respondents Sims, Kothe & Eagleton, Inc. (securities counsel in the 1971 Program offering) and Cross & Company (auditors of the Home-Stake financial statements included in the 1972 Program prospectus) (Doc. 60).

In 1976, the *Anixter* suit was certified as a class action on behalf of nine separate classes, respectively comprising investors in each of Home-Stake's annual programs from 1964 through 1972. *In re Home-Stake Production Co. Securities Litigation*, 76 F.R.D. 351 (N.D. Okla. 1977). Following a five-week jury trial in the summer of 1988, the jury found respondents liable for violations of Section 11 of the Securities Act of 1933 ("the 1933 Act"), 15 U.S.C. § 77k, Section 10(b)

of the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5 (App. 112a-127a).[4] The jury also answered two sets of special interrogatories concerning the statute of limitations. First, the jury found that for each group of claims against each defendant, the applicable class representative did not discover, and with the exercise of reasonable diligence could not have discovered, the factual basis for his or her claim prior to September 1973, when the second SEC lawsuit was filed and Home-Stake entered bankruptcy proceedings (App. 130a-198a). Second, the jury found that respondents Trippet, Kunkel and other Home-Stake officers intended to and did thwart the federal courts, the SEC and the IRS in the performance of their official duties (App. 128a-129a).

Based on these jury findings, the district court ruled that the *Anixter* actions were not barred by the applicable statutes of limitations (App. 109a-111a). In the alternative, based in part on the jury's finding that defendants had "intentionally thwarted and defeated the federal courts, the SEC and the IRS in their efforts to administer and enforce the laws of the United States," the court held that "defendants are estopped from raising statute of limitations defenses to the claims asserted against them" (App. 110a-111a).[5] In November 1989, following a three-day

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[4] The jury found that Kunkel, as an accountant, was not liable for violations of Section 10(b) to the 1964, 1965 and 1966 classes, but was liable to those classes under Section 11.

[5] The court made similar findings with respect to the federal securities law and common-law negligence claims advanced in individual actions (the "*Anderson* actions") filed in April and May 1974 by those petitioners who are not *Anixter* class mem-

jury trial on damages, the district court entered judgments for petitioners and the classes they represent aggregating in excess of $130 million (App. 112a-127a).

4. The Tenth Circuit reversed, ruling that petitioners' claims were time-barred and directing the district court to dismiss the case (App. 1a-50a). With regard to petitioners' claims under Section 11 of the 1933 Act, the court of appeals ruled (a) that the claims of the 1964-1969 investor classes were barred by the "absolute" three-year statute of limitations contained in Section 13 of the 1933 Act; and (b) that the claims of the 1970-1972 investor classes were barred, "as a matter of law," by the one-year statute of limitations contained in Section 13 of the 1933 Act, because investors in those programs were assertedly placed on "inquiry notice" of their claims in April 1971 by the SEC suit and rescission offer prospectus involving the 1970 Program (App. 32a-47a).

As for petitioners' claims under the 1934 Act, the Tenth Circuit ruled that, under this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 111 S.Ct. 2773 (1991), petitioners' Section 10(b) claims were no longer governed by the applicable Oklahoma statute of limitations (two years from the date petitioners discovered or should have discovered the fraud). Rather, the Tenth Circuit held that *Lampf, Pleva* required petitioners' Section 10(b) claims to be assessed under the uniform federal statute of limitations set forth in Section 13 of the 1933

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bers. *See* App. 109a. Since the contentions of the individual petitioners generally track those of the class petitioners, we will, for reasons of simplicity, refer to them collectively as "petitioners."

Act. Applying that Section's three-year and one-year limitations periods, the court of appeals ruled that the Section 10(b) claims of the 1964-1969 and the 1970-1972 investor classes were respectively time-barred (App. 47a-50a).

Supported by the SEC as amicus curiae, petitioners sought rehearing and rehearing en banc. The Tenth Circuit granted rehearing "in order to clarify [its] prior opinion" in two respects (App. 52a). First, the court amended its discussion of Section 10(b), ruling that petitioners' claims thereunder were barred by the three-year/one-year limitations provisions of Section 9(e) of the 1934 Act, given the "substantial similarity" between Section 9(e) and Section 13 (App. 52a-54a). Second, the court expressly ruled that this Court's decision in *Lampf, Pleva* was to be applied retroactively (App. 54a-55a).

5. On December 19, 1991, the President signed into law the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236 (1991). Section 476 of that Act, 105 Stat. 2387, added to the 1934 Act a new Section 27A, 15 U.S.C. § 78aa-1 (Supp. III 1991), which provides in pertinent part that the limitations period for any pending Section 10(b) action commenced on or before June 19, 1991—the day prior to this Court's decision in *Lampf, Pleva*—"shall be the limitation period provided by the laws applicable in the jurisdiction * * * as such laws existed on June 19, 1991" (App. 206a). The stated purpose of Section 27A was to render this Court's decision in *Lampf, Pleva* nonretroactive in its application to Section 10(b) claims. *See* 137 Cong. Rec. H11810-H11813 (daily ed. Nov. 26, 1991) (statements of Congressmen Dingell and Markey); 137 Cong. Rec. S17315 (daily ed.

Nov. 21, 1991) (statement of Senator Riegle); 137 Cong. Rec. S 18624 (daily ed. Nov. 27, 1991) (statement of Senator Bryan).

On December 24, 1991, petitioners moved the Tenth Circuit to recall its mandate, grant rehearing to consider the effect of Section 27A, and reinstate their Section 10(b) claims and judgments. On January 6, 1992, the Tenth Circuit denied the motion without briefing, argument or opinion and petitioners thereafter filed a timely petition for a writ of certiorari.

6. On April 20, 1992, this Court granted the writ, vacated the judgment below and remanded the case to the court of appeals "for further consideration in light of Section 27A of the Securities and Exchange Act of 1934", 112 S.Ct. 1658. After further briefing, in an opinion filed August 24, 1992, the Tenth Circuit ruled that in enacting Section 27A Congress properly exercised its legislative function and that, under Section 27A, petitioners' Section 10(b) claims were not barred by the applicable Oklahoma statute of limitations. Accordingly, the court of appeals reinstated all petitioners' Section 10(b) judgments (App. 90a). The Tenth Circuit did not change those aspects of its earlier opinions which held petitioners' Section 11 claims all time-barred.

7. The respondents other than Sims thereupon sought rehearing. The petition of respondent Trippet was denied by Order dated September 10, 1992 (App. 97a). The petitions for rehearing of the remaining respondents were denied in part and granted in part with a limited remand to the district court in an opinion of the Tenth Circuit dated October 23, 1992 (App. 98a-108a). The remand to the district court was for the entry of additional findings on (i) the statute

of limitations defense of respondent Kothe & Eagleton to the Section 10(b) claims of the 1971 class and (ii) the district court's award of prejudgment interest against all respondents, all to be made in accordance with the guidance provided in the opinion of the Tenth Circuit.

8. The respondents other than Trippet and Sims have moved in the Tenth Circuit for a stay of mandate and have moved in this Court for an extension of time within which to file a petition for a writ of certiorari. On November 4, 1992, Justice White granted respondents an extension until December 23, 1992.

9. This petition seeks review of two holdings by the Tenth Circuit resulting in the reversal of all petitioners' judgments under Section 11 as time-barred.[6]

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[6] Common law negligence judgments under Oklahoma law were rendered against respondents Cross and Kunkel in the individual *Anderson* actions (App. 120a-126a), based on jury verdicts which rejected their statute of limitations defenses (T. 4260-62, 4301-02). Cross did not appeal those judgments in her brief to the Tenth Circuit. Kunkel argued only that each of the *Anderson* plaintiffs failed to present evidence supporting the jury's rejection of Kunkel's statute of limitations defense (Individual Brief of E.M. Kunkel at 7-8; Individual Reply Brief of E.M. Kunkel at 6-7). Petitioners showed without contradiction that under Oklahoma law, *Knudson v. Weeks*, 394 F. Supp. 963, 971-72 (W.D. Okla. 1975), the statute of limitations for negligence was tolled by Kunkel's fraudulent concealment (Appellees' Brief at 67-68). Although the Tenth Circuit never specifically addressed this issue, a footnote in its original opinion (appended to a discussion of the three-year statute of repose contained in Section 13 of the 1933 Act) could possibly be read as reversing the *Anderson* plaintiffs' negligence judgments against Cross and

## REASONS FOR GRANTING THE PETITION

1. The Tenth Circuit erred in its application of "inquiry notice" principles to bar the claims of investors in the 1970-1972 Programs under Section 11 of the 1933 Act. At trial, the jury specifically found that petitioners, in the exercise of reasonable diligence, could not have discovered the facts underlying Home-Stake's Ponzi scheme prior to September 1973. The Tenth Circuit overturned the jury's finding, ruling, as a matter of law, that petitioners were on "inquiry notice" of the fraud practised upon them as of April 30, 1971. That was the date on which Home-Stake's rescission offer prospectus, disclosing the first SEC suit and subsequent consent decree, was mailed to investors in the 1970 Program.[7] According to the

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Kunkel as well as their Section 11 and Section 10(b) judgments (App. 39a n.30). Accordingly, as a protective measure, petitioners also request this Court to reverse the Tenth Circuit's decision to the extent it can be interpreted to overturn petitioners' negligence judgments against respondents Cross and Kunkel as lacking any basis in law or fact because (i) Cross never appealed those judgments, (ii) Kunkel did not claim on appeal that the Oklahoma statute of limitations was not tolled by fraudulent concealment and (iii) any implied holding that the 1964 through 1966 *Anderson* plaintiffs were on notice of their negligence claims against Kunkel more than two years prior to the date suit was filed is inconsistent with the Tenth Circuit's reinstatement of the 1964 through 1966 *Anixter* plaintiffs' Section 10(b) claims against respondent Trippet (which are likewise subject to a 2-year statute of limitations taken from Oklahoma law—*see* App. 100a).

[7] A literal application of the Tenth Circuit's original holding to the 1971 and 1972 investor classes would result in the 1971 investors being deemed to have "inquiry notice" of Home-Stake's fraud six months before they bought their securities, and in the 1972 investors being *time-barred* before they made their initial

Tenth Circuit, the SEC complaint and rescission remedy represented " 'great glowering clouds' * * * sufficient to put plaintiffs on notice that something was amiss" (App. 43a). "However incomplete that notice might have been," the court ruled, "it encompassed enough of a 'storm warning' to start the clock as a matter of law" (App. 47a). The court accordingly held that the Section 11 claims of the 1970-1971 Program investors, filed on March 30, 1973, were time-barred by the one-year limitations period of Section 13.

The court of appeals also held that the Section 11 claims of the 1972 Program investors, filed on May 24, 1974, were time-barred because they were "tethered to a nullity," *i.e.*, the time-barred *Anixter* action. Alternatively, the Tenth Circuit held that the 1972 claims were time-barred by the one-year provision of Section 13 because the filing of the *Anixter* action fourteen months earlier put the 1972 investors on notice as a matter of law. In its alternative holding, the court of appeals simply ignored the fact that no 1972 investor was a plaintiff in the original *Anixter* action and that there was no evidence in the record that the 1972 class representative Joseph Bennett or any other 1972 class member was aware of the filing of the *Anixter* action more than 12 months prior to May 24, 1974. The jury expressly found that Joseph Bennett should not have discovered his Section 11 claims against respondents Trippet, Sims and Cross & Company until September 1973 (App. 179a-181a).

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investments. In its later opinion on rehearing the Tenth Circuit indicated that the investors in the 1971 and 1972 Programs were to be deemed to have inquiry notice on the date of their investments in those programs (App. 99a).

The court of appeals plainly erred in ignoring the express findings of the jury and the district court and substituting its own view of the inferences to be drawn from the SEC enforcement action. The February 1971 SEC suit related solely to the offering and sale of units in Home-Stake's 1970 Program. That suit contained no allegations about Home-Stake's 1964-1969 Programs, no allegations about Home-Stake's 1971-1972 Programs (which did not yet exist), and no allegations about any aspect of the Ponzi scheme that forms the basis of petitioners' case. Indeed, respondents Kothe & Eagleton and Cross & Company had not been retained by Home-Stake nor had they performed any services for any Home-Stake company at the time of the SEC suit. While respondent Norman Cross was the auditor for Home-Stake in connection with its 1969 and 1970 programs, he was not implicated in the 1971 SEC suit.[8] The settlement of the SEC action by Home-Stake's circulation of a rescission offer prospectus to all appearances cured the limited violations—oversales of units in, and overestimates of reserves and income from, the 1970 Program—of which the SEC had complained.

In determining that the 1971 SEC litigation put investors on notice of the wholly distinct fraud alleged here, the Tenth Circuit in effect holds that once an investor learns that the SEC has compelled an issuer to correct any securities law violation, that investor is on notice, as a matter of law, that any subsequent securities offering by that or any related issuer may

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[8] Cross did, however, provide false audited financial statements which were included in the rescission offer prospectus.

well be fraudulent for any reason. According to the Tenth Circuit, a securities law violation is a sort of original sin that taints an issuer's securities indefinitely. Any investor purchasing a subsequent issue has only one year to investigate the possibility of fraud in connection with such later offering, even if the issuer has cured its prior violation to the satisfaction of the SEC and the courts and there are no other facts suggesting fraud in the subsequent offering of the kind previously asserted or any other.

This holding flies in the face of common sense, subverts the policies of the federal securities laws, and improperly invades the province of the jury. In settling the 1971 SEC suit, Home-Stake agreed to correct all violations alleged by the SEC and to abide by a court injunction against future violations, breach of which was punishable by criminal contempt. Confronted with these facts, a rational investor could reasonably infer that Home-Stake's wrongdoing had been identified and cured. Indeed, more than 600 investors in the 1970 Program declined Home-Stake's rescission offer, and more than 500 persons subsequently decided to invest in its 1971-1972 Programs. And even if an investor could plausibly have read the SEC and court-approved rescission offer prospectus as the work of a chronic, rather than a repentant, sinner, the Tenth Circuit wholly failed to explain why that inference was so compelling that it was, as a matter of law, the *only* inference a trier of fact could permissibly draw.

The practical effects of the Tenth Circuit's decision will seriously compromise the policies of the federal securities laws. Any investor who purchases securities from an issuer that previously signed an SEC consent

decree will be deemed on "inquiry notice" of fraud from the moment of his purchase, leaving him just 12 months to investigate the possibility of fraud and bring suit if fraud is discovered. The virtual impossibility of meeting this deadline is shown by the record of this case. Following the April 1971 consent decree, it took the SEC, which receives quarterly filings from registrants and which has broad subpoena powers and a large staff of trained investigators, approximately $2^1/_2$ years to discover Home-Stake's Ponzi scheme and challenge it in court.

Given the unreasonableness of the Tenth Circuit's discovery deadline, investors will have strong incentives to avoid securities of issuers who have previously been the subject of SEC enforcement actions. The decision will thus impede free access to the capital markets by investors and issuers alike. To avoid jeopardizing their future securities offerings, issuers will have strong incentives not to settle cases with the SEC, conscious that a consent decree can become an indelible badge of fraud. And the practical consequences of the Tenth Circuit's holding, as the SEC explained in urging rehearing below, are even more unfortunate where the issuer is dishonest: "[T]he panel's holding, perversely and ironically, allows persons who have previously violated the securities laws and do so again to take advantage of a shorter statute of limitations than first-time wrongdoers" (SEC Amicus Br. 5 (filed Aug. 27, 1991)).

In holding that an SEC action puts investors on inquiry notice, as a matter of law, of unrelated frauds not alleged by the SEC, the decision below conflicts with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979).

An investor there sued accountants in July 1977 for falsely certifying an issuer's financial statements. The accountants raised in defense the applicable state two-year statute of limitations, contending that the investor was put on inquiry notice in June 1974, when the SEC brought market manipulation charges against the underwriters of the issuer's securities (609 F.2d at 588-589). The Second Circuit reversed the district court's dismissal of the complaint, holding that, because of conflicting inferences that could be drawn from these undisputed facts, summary judgment on the statute-of-limitations issue was improper (*id.* at 592-593). In so holding, the court emphasized that the SEC's June 1974 order had alleged no fraud by the accounting firm and that "it was not until 1976 that the SEC was able to name these accountants as participants in the fraud" (*id.* at 592). The Second Circuit went on to state (*ibid.*):

> If the SEC with its commendable expertise and specialized investigative teams was unable to discover the complicity of these accountants until shortly before its Opinion and Order of September 1, 1976 was released, it cannot be said as a matter of law that appellant should have discovered their participation any earlier.

In contrast, the Tenth Circuit has held herein that the 1971 SEC case, which was brought only against the issuers and their officers and directors, put investors on notice, as a matter of law, of wrongdoing by accountants not named in the SEC action and by Kothe & Eagleton, who were not retained as attorneys by Home-Stake until after the SEC case had been filed. The Tenth Circuit decision thus creates a pre-

sumption that all persons who represent a party sued by the SEC are tainted so as to start the immediate running of the statute of limitations with respect to work done by them on securities offerings made after the SEC suit. Such a presumption is unsupported by logic and law.

The Tenth Circuit's decision also conflicts with well-established principles governing appellate review of jury verdicts in securities law cases. The issue of when an investor should discover, in the exercise of reasonable diligence, a misstatement or omission in a securities offering, is generally a question of fact for the jury. *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873, 879 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984); *Robertson*, *supra*, 609 F.2d at 592-593. A court of appeals is barred by the Seventh Amendment from redetermining facts found by a jury. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-359 (1962). It is for the jury to judge the credibility of witnesses, weigh conflicting evidence, draw reasonable inferences from undisputed facts, and arrive at a conclusion. *Tennant v. Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944). Moreover, in reviewing a jury verdict, this Court has held that courts of appeal are "bound to view the evidence [presented to the jury] in the light most favorable to [the prevailing party below] and to give it the benefit of all inferences which the evidence fairly supports even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.* 370 U.S. 690, 696 (1962).

Here the jurors saw the SEC's 1971 complaint, the ensuing consent decree, and Home-Stake's rescission offer prospectus. The jurors heard testimony from the

1970-1972 class representatives concerning their understanding of those events. And the jurors heard arguments from respondents' counsel urging the jury to draw the very inferences that the Tenth Circuit ultimately drew. The jury, however, found in answers to special interrogatories that the 1970-1972 class representatives neither discovered nor should have discovered the fraud in question until September 1973.[9]

For the Tenth Circuit to overturn this finding and resolve the notice issue as a matter of law was a usurpation of the jury's constitutional role as finder of the facts. This Court has repeatedly recognized that "the drawing of legitimate inferences from the facts are jury functions." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *Accord Continental Ore Co., supra*, 370 U.S. at 700-701, *Lavender v. Kurn*, 327 U.S. 645, 652-653 (1946).[10] And both the Second and the Ninth Circuits have specifically held that the question whether a plaintiff has exercised reasonable diligence in discovering fraud for statute of limitations purposes, where conflicting inferences may be drawn from otherwise undisputed facts, is a fact question to be decided by the jury. *Robertson v. Seidman & Seidman, supra*, 609 F.2d at 592-593; *Mosesian v. Peat, Marwick, Mitchell & Co., supra*,

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[9] Respondents did not appeal either the form of the jury instructions concerning the statute of limitations or the form of the special jury interrogatories. *See* Joint Br. 7-22.

[10] This Court has held that an appellate court must defer to the fact finder's role in drawing inferences from evidence even where the inference is drawn by the district court, whose determinations are subject to the more lenient "clearly erroneous" standard of review. *Anderson v. City of Bessemer*, 470 U.S. 564, 573-574 (1985).

727 F.2d at 879. *Compare Byers v. Burleson*, 713 F.2d 856, 861-862 (D.C. Cir. 1983) (application of discovery rule in medical malpractice case).[11]

2. The Tenth Circuit also erred in its holding concerning equitable estoppel. In considering the timeliness of the Section 11 claims of the 1964-1969 investor classes, the court of appeals held that the doctrine of equitable estoppel, applied by the district court to bar respondents' reliance on the statute of limitations, "is not available to avoid the statute of repose established by Section 13" (App. 38a). The Tenth Circuit characterized Section 13 as erecting an "absolute bar" to Section 11 claims brought more than three years after the purchase of securities, citing dictum to this effect in *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2887 (1991).

In so holding, the Tenth Circuit refused to recognize the distinction, articulated in decisions of this Court and others, between equitable *tolling* and equitable *estoppel*. Equitable tolling is a doctrine which holds that "where the party injured by the fraud remains in ignorance of it without any fault or want

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[11] The cases that the Tenth Circuit cites to support its result involve situations where the plaintiffs at an early date had knowledge of substantially the same facts upon which they later based their claims. *See Kennedy v. Josephthal & Co.*, 814 F.2d 798 (1st Cir. 1987); *State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 694 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Cook v. Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978). Here, by contrast, the factual allegations underlying the 1971 SEC action and ensuing consent decree were entirely distinct from the fraudulent scheme that was the basis for the judgments overturned by the Tenth Circuit.

of diligence or care on his part, the bar of the [limitations] statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1875). *See also Holmberg v. Armbrecht*, 327 U.S. 392, 396-397 (1946). Because the one-year period of Section 9(e) of the 1934 Act is based on discovery of the facts constituting the fraud, this Court held in *Lampf, Pleva* that the three-year period of Section 9(e) is "a period of repose inconsistent with tolling" (111 S.Ct. at 2782). By a parity of reasoning, that conclusion also applies to Section 13 of the 1933 Act.

In contrast, equitable *estoppel* operates to prevent a defendant from raising an otherwise dispositive statute-of-limitations defense because of his inequitable conduct after the initial tort. *See* Bloomenthal, *The Statute Of Limitations And Rule 10b-5 Claims: A Study In Judicial Lassitude*, 60 U. Colo. L. Rev. 235, 291-292 (1989).[12] This Court applied the doctrine in an FELA case to estop a defendant from relying on a three-year statute of limitations, noting that the defendant had fraudulently induced the plaintiff not

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[12] Although utilizing the term fraudulent concealment rather than equitable estoppel, a recent law review article explores at length the long-standing distinction between equitable tolling of statutes of limitation for claims of fraud and the suspension of statutes of limitation for all kinds of claims, including fraud, that results from a defendant's separate conduct of fraudulently concealing from a plaintiff the acts giving rise to the claim. Johnson, *Securities Fraud And The Mirage Of Repose*, 1992 Wis. L. Rev. 607, 631-32 (1992). Professor Johnson roundly criticizes the Tenth Circuit's decision in this case for its "bungling of the tolling issue." *Id.* at 666-71.

to sue within the time prescribed by law. *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959). The Court explained that equitable estoppel springs from "the maxim that no man may take advantage of his own wrong," a "deeply rooted" principle that "has frequently been employed to bar inequitable reliance on statutes of limitations" (395 U.S. at 232-233).

Addressing the three-year limitations period at issue here, Professor Bloomenthal has explained that

> Equitable estoppel, properly understood, is not inconsistent with the fact that Congress intended the periods of limitation to be absolute. The Congress was attempting to assure directors and others that, after a period of time, no action would be brought against them for allegedly false statements made in a registration statement or otherwise in connection with the sale or purchase of a security. Congress was not saying that by their own subsequent conduct they could not, in effect, extend the period of limitation. It is critical, however, to the application of such doctrine that it be some act other than the events that constitute the basis for the claim that reasonably caused the plaintiff to forbear from asserting his claim.

Bloomenthal, *supra*, 60 U. Colo. L. Rev. at 292.

Thus, in interpreting the Interstate Land Sales Full Disclosure Act (ILSFDA), 15 U.S.C. § 1711, which contains a three-year statute of limitations substantially identical to that of Section 13, the Seventh Circuit applied *Glus* to hold that a defendant could be

equitably estopped from relying on a limitations defense, notwithstanding that equitable tolling was unavailable. *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978). And the Second Circuit applied equitable estoppel to prevent a defendant from relying on Section 13's requirement that a Section 12(1) action be brought within one year after the underlying violation was committed. *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1054-1055 (2d Cir. 1969).[13]

In this case, respondents committed numerous independent fraudulent acts over the nine years from 1965 to 1973 to prevent both petitioners and the members of the investor classes they represent, as well as the SEC, the IRS and the federal courts, from discovering the initial fraud in the sale of the Home-Stake 1964 through 1969 Programs. For example, respondent Trippet personally directed the making of Ponzi payments by Home-Stake every quarter through February of 1973 to conceal the absence of program development and the lack of profitable operations (T.

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[13] Equitable estoppel has been applied by the courts of appeals, in a variety of contexts, to prevent defendants from enjoying the benefit of the running of a statute of limitations procured by fraud. *E.g.*, *Cange v. Stotler & Co.*, 826 F.2d 581, 587 (7th Cir. 1987) (Commodity Exchange Act); *United States v. Fidelity & Deposit Co.*, 813 F.2d 697, 700 (5th Cir. 1987) (Miller Act); *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983) (ILSFDA); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1370 (6th Cir. 1975) (ADEA); *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946, 948 (3d Cir. 1971) (Jones Act); *United States v. Prince-McNemar Construction Corp.*, 320 F.2d 663, 665-666 (9th Cir. 1963) (Miller Act); *Scarborough v. Atlantic Coast Line R.R.*, 178 F.2d 253, 258 (4th Cir. 1949), *cert. denied*, 339 U.S. 919 (1950) (FELA).

742-46, 837-38). Trippet and respondent Sims authored the fictitious program operations reports mailed monthly or quarterly to investors (T. 233-38, 624-25, 1416-20). Trippet also orchestrated the annual preparation and distribution to investors of fraudulent valuation reports on the 1964 through 1969 Programs (T. 1421-25) and, over the years, authored literally hundreds of letters to class members providing false answers to questions raised by them concerning program distributions and operations (*E.g.*, Exs. 179, 911, 1731, 3182, 3386, 5052). Respondents Kunkel and Cross participated in the preparation and dissemination to 1964 through 1969 investors of fraudulent financial statements contained in Home-Stake's annual reports from 1964 through 1972 (Exs. RD 48-57).

In addition, from 1964 through 1972, each successive program registration statement was submitted to the SEC with false and misleading information about Home-Stake and its prior programs (*E.g.*, Exs. RD 394-430). Moreover, equally false annual reports on Form 10-K for each program were likewise filed with the SEC for each year (Exs. RD 485-504). Respondents Trippet, Sims, Kunkel and Cross either signed those fraudulent filings or audited false financial statements contained therein.[14] Finally, in connection with the 1970 Program rescission offer, respondents Trippet, Sims, Kunkel and Cross misled

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[14] During the 1970-71 SEC investigation of Home-Stake, respondent Kunkel testified falsely under oath to the SEC about a purportedly independent equipment supplier (which was in fact a sham corporation organized by Trippet to defraud investors and the IRS) (Ex. 2618) and made false written representations to the SEC about the value of Home-Stake's major asset (a worthless multi-million dollar receivable) (Ex. 2640).

investors, the SEC and the federal district court in 1971 by preparing and disseminating the fraudulent rescission offer prospectus (which included false Home-Stake financial statements) in blatant violation of the consent degree thereby continuing the concealment from all parties of the Home-Stake Ponzi scheme.[15]

Based on this conduct, the jury answered special interrogatories finding that Home-Stake and its officers (including respondents Trippet and Kunkel), intentionally prevented the SEC, the IRS, and the federal courts from discovering the fraudulent sales of securities of which petitioners complain (App. 128a-129a). The trial court concurred and ruled that defendants were equitably estopped from raising statute of limitations defenses to petitioners' Section 11 and Section 10(b) claims (App. 110a-111a). The Tenth Circuit did not dispute that the evidence of defendants' fraudulent post-sale conduct summarized above and the jury's findings based thereon laid the factual predicate for the district court's invocation of equitable estoppel. Rather, the court held the doctrine inapplicable as a matter of law, asserting that its invocation here would "operate[] to trump a clear outer limit intended by Congress" (App. 38a).[16] Yet as Professor Bloomenthal has pointed out, "the legislative history [of the 1933 Act] makes it clear that

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[15] Three years earlier, Trippet had secretly settled a securities fraud class action in violation of Rule 23(e), Fed. R. Civ. P. (App. 26a n.2).

[16] In its decision, the Tenth Circuit relied in part on this Court's decision in *Lampf, Pleva* (App. 37a n.22). As Professor Johnson has demonstrated, that is simply a misreading of *Lampf, Pleva*. Johnson, *supra*, 1992 Wis. L. Rev. 607, 662-71 (1992).

Congress intended the absolute bar to relate to the fraud itself and not to subsequent steps to conceal it." Bloomenthal, *supra*, 60 U. Colo. L. Rev. at 294. *Accord* Johnson, *supra*, 1992 Wis. L. Rev. 656-62 (1992).[17]

In sum, the Tenth Circuit has interpreted Section 13 to bar the application of equitable estoppel principles in a manner that conflicts both with this Court's decision in *Glus* and with the decisions of other circuits interpreting statutes of limitation having comparable language and purpose. In effect, the Tenth Circuit has turned an ancient adage on its head and adopted the principle that, for cases under Section 13, two wrongs make a right for defendants. Certiorari should be granted to correct the court of appeals' error which, if allowed to stand, would unjustifiably reward securities law violators for the

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[17] The policy of "repose" weighted so heavily by the Tenth Circuit is no more important than the policy of "finality of judgments." Yet this Court has held that the finality of a judgment must give way to the equitable power of a court to prevent a party from taking advantage of fraud. Thus, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-246 (1944), the Court used its equity power to vacate a final judgment for patent infringement procured by a party through "a deliberately planned and carefully executed scheme to defraud not only the Patent Office but the Circuit Court of Appeals." *Accord S&E Contractors, Inc. v. United States*, 406 U.S. 1, 15 (1972). Application of this equitable power, moreover, is not confined to situations involving fraud on the courts. *See Alberta Gas Chemicals, Ltd., v. Celanese Corp.*, 650 F.2d 9, 13 (2d Cir. 1981) (vacating administrative decisions procured by fraud on agency); *Toscano v. Commissioner*, 441 F.2d 930 (9th Cir. 1971) (sanctioning fraud on the IRS and the Tax Court); *United Business Communications, Inc. v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1187-1188 (D. Kan. 1984) (vacating prior judgment).

success of their ongoing efforts in actively concealing from investors and government agencies their fraudulent sales of securities.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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December 11, 1992

# 92-1003

No. 92-

Supreme Court, U.S.
FILED
DEC 11 1992
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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WILLIAM H. DENNLER, *et al.*,

*Petitioners,*

v.

ROBERT S. TRIPPET, *et al.*,

*Respondents.*

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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**No. 90-5040**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD,

Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; NORMAN C. CROSS, JR.,

Defendants-Appellants.

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**No. 90-5041**

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A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. and Helen Burgess; DEWEY J. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B. COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARFF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; E. STARR; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR., TED B. WESTFALL,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFEE, TAFT, MARK, BOND, RUCKS,

AND WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns,

Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; NORMAN C. CROSS, JR.,

Defendants-Appellants.

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**No. 90-5042**

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A.M. ANDERSON; RICHARD J. ANTON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, E.P. Bernuth, Sophie K. Bernuth, Joseph A. Buda, George and Helen Burgess; DEWEY CALI; ROBERT B. COBURN; COBURN & LIBBY, INC.; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; MARGARET C. EVERETT; L.L. FERGUSON; ISADOR H. FINKELSTEIN; H.W. GOULDTHORPE; GEORGE L. HALLER; JACK HANSON; RALPH HART; F.H. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; HOWARD G. KICHERER; ELIZABETH C. KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL MCFALL; JAMES F. MADDEN; ALBERT MANGANELLI; NICHOLAS MARCHESE; STANLEY A. MARKS; C.W. MOELLER; WILLIAM H. MORTENSEN; CARL OLSON; PATRICIA) OLSON; CARL PALERMO; FRANK PALERMO; ROY T. PARKER; HELEN M. REEDER; D.D. SCARFF; M.L. SCARFF; RICHARD SCOTT; LOUIS P. SINGER; WILLIAM R. SMART; J. STANFORD SMITH; G. CURTIS STEWART; PAUL TOWNSEND; VERNON UNDERWOOD;

TED B. WESTFALL; J. HOWARD WOOD; SIDNEY WOOLWICH; MURRAY ZIMMERMAN,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH, JR.; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,
Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of NORMAN C. CROSS, JR.,
Defendant-Appellant.

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**90-5043**

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Marcella McHenry, Merl McHenry, Fred J. Borch, David Breslauer, Joseph A. Buda; DEWEY CALI; JAMES CLARK; MARY CLARK; WILLIAM H. COLQUHOUN; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; L.L. FERGUSON; JACK FINE; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; JAMES J. HAYES; EARL D. HILBURN; DOROTHY C. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; JOHN E. HUTCHINSON, III; HAROLD KAPLAN; W.S. JONES; HOWARD G. KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; D.W. LYNCH; D.B.

LYNCH, DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; ANTHONY MACAGNA; JAMES F. MADDEN; ALBERT MANGANELLI; NICOLAS A. MARCHESE; CHARLES J. MELOUN; C.W. MOELLER; CARL J. OLSON; PATRICIA OLSON; THOMAS O. PAINE; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; HOWARD RUBENSTEIN; D.D. SCARFF; M.L. SCARFF; C.S. SEMPLE; WILLIAM SMART; J. STANFORD SMITH; JANET G. STEWART; GERALD TOOMEY; OLIVER J. TROSTER; H.B. WALDRON, JR.; HUMBERTO ZAVALETA; MURRAY ZIMMERMAN,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM BLUM; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFFE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,

Defendants,

and

WYNEMA ANNA CROSS, as Executrix of the Estate of NORMAN C. CROSS, JR.,

Defendant-Appellant.

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**No. 90-5044**

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IVAN A. ANIXTER; WILLIAM H. DENNLER; JOHN D. LOCKTON; FRANCIS K. MCCUNE; TED B. WESTFALL; WILLIAM H. MORTENSEN; PETER P. LUCE; WILLIAM D. ROBERTSON; BERNARD D. BROEKER; THOMAS H. THORNER; DOLLY YOSHIDA MARTIN; WILLIAM GROHNE; JAMES H. LEACHMAN; BEVERLY H. WARREN; JOSEPH C. BENNETT,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1964 PROGRAM OPERATING CORPORATION; HOME-STATE 1965 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1972 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; H.L. FITZGERALD; H.R. SMITH; FRANK E. SIMS; JOHN T. LENOIR; THOMAS A. LANDRITH; E.M. KUNKEL; JACKSON M. BARTON; MARVIN R. BARNETT; DONALD C. LARRABEE; J.D. METCALFE; H.B. GUTELIUS; CARL A. CLAY; WILLIAM E. MURRAY; MURRAY, PATTERSON & SHARPE; DRYFOOS & COMPANY; MCAFEE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF; SIMPSON THACHER AND BARTLETT; HARRY HELLER; WILLIAM BLUM; RICHARD A.

GANONG; WILLIAM D. LEWIS; LEWIS & GANONG; RICHARD A. GANONG, INC.; NORMAN C. CROSS, JR.; KENT KLINEMAN,

Defendants,

and

CROSS AND COMPANY,

Defendant-Appellant.

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**No. 90-5045**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA; and JOSEPH C. BENNETT, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.; MURRAY, PATTERSON & SHARPE, a partnership; DRYFOOS & COMPANY, a limited partnership; MCAFEE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF, a professional corporation; SIMPSON THACHER AND BARTLETT, a partnership; LEWIS & GANONG, a partnership; WILLIAM E. MURRAY; KENT KLINEMAN; WILLIAM BLUM; HARRY HELLER; RICHARD A.

GANONG; WILLIAM D. LEWIS; JOHN T. LENOIR; CARL E. CLAY; JACKSON M. BARTON; MARVIN R. BARNETT; FRANK E. SIMS; H.R. SMITH; DONALD C. LARRABEE; RICHARD A. GANONG, INC., a corporation,
Defendants,

and

KOTHE & EAGLETON, INC., a professional corporation,
Defendant-Appellant.

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**No. 90-5046**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,
Defendants,

and

E.M. KUNKEL,
Defendant-Appellant.

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**No. 90-5047**

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RICHARD J. ANTON; MORRELL H. BLESH; ARTHUR M. BUECHE; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; JOSEPH H. GAUSS; MARGARET W. GILLESPIE; H.W. GOULDTHORPE; GEORGE L. HALLER; RALPH HART; CHARLES M. HEIDEN; DOROTHY C. HOLT; VICTOR HOLT, JR.; RICHARD M. HURST; P.J. JENSEN; ROBERT B. KEEGAN; MILTON F. KENT; MILLIE B. LASSING; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; FERDINAND F. MCALLISTER; FRANCIS K. MCCUNE; RUSSELL W. MCFALL; JOHN G. MARTIN; H.D. MEADER; BETTY JANE MILLS; DAVID K. MILLS; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; WILLIAM R. SMART; J. STANFORD SMITH; ROBERT P. STRUB; ESTATE OF VERA STRUB; VERNON UNDERWOOD; HOYT AMMIDON,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM D. LEWIS; RICHARD A. GANONG; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; LEWIS & GANONG, a partnership; ROBERT S. TRIPPET; THOMAS A. LANDRITH,

Defendants,

and

E.M. KUNKEL,

Defendant-Appellant.

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**No. 90-5048**

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MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1964 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; THOMAS A. LANDRITH, JR.; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership,

Defendants,

and

E.M. KUNKEL,

Defendant-Appellant.

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**No. 90-5049**

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A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. Burgess, Helen Burgess; DEWY I. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B.

COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARFF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR.; TED B. WESTFALL,

Plaintiffs-Appellees.

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM BLUM; THOMAS A. LANDRITH, JR.; MCAFEE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; NORMAN C. CROSS, JR.,

Defendants,

and

E.M. KUNKEL,

Defendant-Appellant.

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**No. 90-5051**

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MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; CHARLES M. HEIDEN; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; DOREEN B. HOYT; PETER J. JENSEN; MILTON F. KENT; MILLIE B. LASSING; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; THOMAS A. LANDRITH, JR.; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership,

Defendants.

and

E.M. KUNKEL,

Defendant-Appellant.

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**No. 90-5053**

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A.M. ANDERSON; RICHARD J. ANTON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, E.P. Bernuth, Sophie K. Bernuth, Joseph A. Buda, George

and Helen Burgess; DEWEY CALI; ROBERT B. COBURN; COBURN & LIBBY, INC.; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; MARGARET C. EVERETT; L.L. FERGUSON; ISADOR H. FINKELSTEIN; H.W. GOULDTHORPE; GEORGE L. HALLER; JACK HANSON; RALPH HART; F.H. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; HOWARD G. AND ELIZABETH C. KICHERER, JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; JOHN D. LOCKTON; D.W. AND D.B. LYNCH; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL MCFALL; JAMES F. MADDEN; ALBERT MANGANELLI; NICHOLAS MARCHESE; STANLEY A. MARKS; C.W. MOELLER; WILLIAM H. MORTENSEN; CARL AND PATRICIA OLSON; CARL PALERMO; FRANK PALERMO; ROY T. PARKER; HELEN M. REEDER; D.C. SCARFF; M.L. SCARFF; RICHARD SCOTT; LOUIS P. SINGER; WILLIAM R. SMART; J. STANFORD SMITH; G. CURTIS STEWART; PAUL TOWNSEND; VERNON UNDERWOOD; TED B. WESTFALL; J. HOWARD WOOD; SIDNEY WOOLWICH AND MURRAY ZIMMERMAN,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION, a Delaware corporation; ELMER M. KUNKEL; THOMAS A. LANDRITH; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership; NORMAN C. CROSS, JR.; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5055**

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A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. Burgess, Helen Burgsss; DEWY I. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B. COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARPF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR.; TED B. WESTFALL,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation;

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5056**

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A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. and Helen Burgess; DEWEY J. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B. COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN B. KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARFF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; E. STARR; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR.; TED B. WESTFALL,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION, a Delaware corporation; HARRY HELLER, SIMPSON THACHER AND BARTLETT, a partnership; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFEE, TAFT, MARK, BOND, RUCKS, AND

WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; NORMAN C. CROSS, JR.,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5057**

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Marcella McHenry, Merl McHenry, Fred J. Borch, David Breslauer, Joseph A. Buda; DEWEY CALI; JAMES CLARK; MARY CLARK; WILLIAM H. COLQUHOUN; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; L.L. FERGUSON; JACK FINE; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; JAMES J. HAYES; EARL D. HILBURN; DOROTHY C. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; JOHN E. HUTCHINSON, III; HAROLD KAPLAN; W.S. JONES; HOWARD G. KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; D.W. LYNCH; D.B. LYNCH; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; ANTHONY MACAGNA; JAMES F. MADDEN; ALBERT MANGANELLI; NICOLAS A. MARCHESE; CHARLES J. MELOUN; C.W. MOELLER; CARL J. OLSON; PATRICIA OLSON;

THOMAS O. PAINE; CARL E. PALERMO; PRANK A. PALERMO; ROY T. PARKER, JR.; HOWARD RUBENSTEIN; D.D. SCARFF; M.L. SCARFF; C.S. SEMPLE; WILLIAM SMART; J. STANFORD SMITH; JANET G. STEWART; GERALD TOOMEY; OLIVER J. TROSTER; H.B. WALDRON, JR.; HUMBERTO ZAVALETA; MURRAY ZIMMERMAN,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION, a Delaware corporation; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM BLUM; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFFE, TAFT, MARK, BOND, RUCKS, AMD WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their succsssors and assigns; NORMAN C. CROSS, JR.; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5058**

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RICHARD J. ANTON; MORRELL H. BLESH; ARTHUR M. BUECHE; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; JOSEPH H. GAUSS; MARGARET W. GILLESPIE; H.W. GOULDTHORPE; GEORGE L. HALLER; RALPH HART; CHARLES M. HEIDEN; DOROTHY C. HOLT; VICTOR HOLT, JR.; RICHARD M. HURST; P.J. JENSEN; ROBERT B. KEEGAN; MILTON F. KENT; MILLIE B. LASSING; JOHN D. LOCKTON; D.W. LYNCH;

D.B. LYNCH; FERDINAND F. MCALLISTER; FRANCIS K. MCCUNE; RUSSELL W. MCFALL; JOHN G. MARTIN; H.D. MEADER; BETTY JANE MILLS; DAVID K. MILLS; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; WILLIAM R. SMART; J. STANFORD SMITH; ROBERT P. STRUB; ESTATE OF VERA STRUB; VERNON UNDERWOOD; HOYT AMMIDON,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPAMY; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION,
Defendants,

and

ROBERT S. TRIPPET,
Defendant-Appellant.

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**No. 90-5059**

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RICHARD J. ANTON; MORRELL H. BLESH; ARTHUR M. BUECHE; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; JOSEPH H. GAUSS; MARGARET W. GILLESPIE; H.W. GOULDTHORPE; GEORGE L. HALLER; RALPH HOLT; VICTOR HOLT, JR.; RICHARD M. HURST; P.J. JENSEN; ROBERT B. KEEGAN; MILTON F. KENT; MILLIE B. LASSING; JOHN D. LOCKTON; D.W. LYNCH; FERDINAND F. MCALLISTER; FRANCIS K. MCCUNE; RUSSELL W. MCFALL; JOHN G. MARTIN; H.D. MEADER; BETTY JANE MILLS; DAVID K. MILLS; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; WILLIAM R. SMART; J. STANFORD SMITH; ESTATE OF VERA STRUB; VERNON UNDERWOOD; HOYT AMMIDON,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM D. LEWIS; RICHARD A. GANONG; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; LEWIS & GANONG, a partnership; E.M. KUNKEL; THOMAS A. LANDRITH,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5062**

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MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5063**

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MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1964 PROGRAM OPERATING CORPORATION, a Delaware corporation; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AMD BARTLETT,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5064**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5065**

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IVAN A. AMIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE

1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5066**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LAMDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,

Defendants,

and

FRANK E. SIMS,
Defendant-Appellant.

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**No. 90-5067**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,
Defendants,

and

FRANK E. SIMS,
Defendant-Appellant.

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**Appeals from the United States District Court For the Northern District of Oklahoma, D.C. Nos. 73-C-382, 74-C-180, 74-C-229, 74-C-230, 74-C-226, 74-C-224, 74-C-225, 74-C-229, 74-C-228, 74-C-230, 74-C-227, 74-C-225, 73-C-377, 73-C-381**

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Walter Steele, Denver, Colorado, and Thomas M. Affeldt, co-counsel, (C.B. Savage with him on the briefs) of Savage, O'Donnell, Scott, McNulty & Affeldt, Tulsa, Oklahoma, for Defendant-Appellant E.M. Kunkel.

B. Hayden Crawford (Kyle B. Haskins with him on the briefs) of Crawford, Crowe & Bainbridge, P.A., Tulsa, Oklahoma, for Defendants-Appellants Norman C. Cross, Jr.; Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr.; and Cross and Company.

Stan P. Doyle (James C. Thomas with him on the briefs) of Doyle & Harris, Tulsa, Oklahoma, for Appellant-Defendant Kothe & Eagleton, Inc., a professional corporation.

Peter Van N. Lockwood of Caplin & Drysdale, Chartered, Washington, D.C., (Elihu Inselbuch of Caplin & Drysdale, New York, New York; William A. Wineberg and Michael R. Simmonds of Broad, Schulz, Larson & Wineberg, San Francisco, California; and William H. Hinkle, Tulsa, Oklahoma, with him on the briefs) for Plaintiffs-Appellees.

Frank E. Sims, Pro Se Defendant-Appellant, Tulsa, Oklahoma, on the brief.

Robert S. Trippet, Pro Se Defendant-Appellant, Tulsa, Oklahoma, on the brief.

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Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

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MOORE, Circuit Judge.

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Despite the many issues raised in these consolidated appeals, a single question of law predominates our review. After study of the statutory scheme, the briefs, and record, we conclude the only question before us is whether this action was barred by the untimely filing of the original complaint under Section 13 of the Securities Act of 1933, as amended by the Securities Exchange Act of 1934, 15

U.S.C. § 77m. We hold that it was and, therefore, reverse the judgment and dismiss the complaint.

## I. Background

In March 1973, Ivan A. Anixter, Blanche Dickenson, and Dolly Yoshida filed a lawsuit in the Northern District of California alleging Home-Stake Production Company and certain of its officers and directors conspired to violate the federal securities laws in their sale of interests in oil and gas production programs (the Anixter Action). After transfer of this and other individual suits to the Northern District of Oklahoma by the Judicial Panel on Multidistrict Litigation in 1974; amendments of the original complaint in 1974, 1979, and 1985; and the 1977 certification of nine separate classes to proceed with the case; a 1988 trial culminated in a jury verdict for all plaintiff classes and individually consolidated actions. Damages were awarded totalling approximately $130,000,000.

According to plaintiffs, liability was predicated on an elaborate and continuing scheme in which Home-Stake Production Company, an Oklahoma corporation engaged in the business of developing oil and gas properties, sold working interests in various program leaseholds, offering investors not only the promise of a return on the investment but also attractive tax benefits through individual deductions of intangible drilling costs (IDC). From 1964 until 1972, Home-Stake established subsidiary corporations, annual Program Operating Corporations (POC), representing separate production programs registered with the Securities and Exchange Commission (SEC) under 15 U.S.C. § 77a. Contrary to Home-Stake's representations, however, investments in one of these POCs were not directed at developing the particular oil property but instead were recirculated and recharacterized,[1] ultimately to be distributed to subsequent

[1] For example, plaintiffs set forth evidence that of the nearly $35,000,000 invested in the 1968 and 1969 POCs, only $500,000 could be attributed to development.

POC purchasers in the form of quarterly payments purported to represent income from oil production. In substance, plaintiffs claimed, these were classic Ponzi payments.

In response to wary or disgruntled investors who either threatened or filed action, Home-Stake would repurchase investments or settle investor suits.[2] At various times, the IRS audited individual investor's tax returns, questioning the IDC deductions, and summoned Home-Stake representatives to answer questions about accounting methods, record-keeping, and production activities, Finally, in late 1970, the SEC initiated an investigation of Home-Stake.

On February 10, 1971, the SEC filed a complaint in the United States District Court for the District of Columbia (Exh. RD 657), alleging the Home-Stake 1970 POC, Home-Stake Production Company, and certain Home-Stake officers and directors, Robert S. Trippet, E.M. Kunkel, Thomas Landrith, J.D. Metcalfe, H.B. Gutelius, and H.L. Fitzgerald,[3] failed to meet the information requirements of Section 10 of the Securities Act of 1933 (the 1933 Act); overestimated oil reserves and income in the nine oil recovery projects represented to be selected for the 1970 POC; disseminated information in the 1970 registration filed with the SEC which conflicted with program information in un-

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[2] In 1968, for example, an action was filed in the Northern District of Oklahoma alleging violations of the securities laws under Sections 10(b) and 17(a) as well as common law fraud and other claims. The case was certified as a class action, *George H. McFadden & Bro., Inc. v. Home-Stake Prod. Co.*, 295 F. Supp. 590 (N.D. Okla. 1968). However, the class representative subsequently accepted the settlement offered by Home-Stake and withdrew the motion for class certification. The district court dismissed the action with prejudice.

[3] Each of these defendants was again named in the 1973 Anixter Action, which also added the 1965 and 1971 POCs and Norman C. Cross, Jr.

registered Black Books;[4] filed a post-effective amendment with the SEC distributed to all POC participants containing representations with which it could not comply;[5] and oversold the 1970 POC, investing a substantial part of the $22,000,000 received in short-term notes. The SEC alleged these activities were in violation of Sections 5(a), 5(b), and 17(a) of the 1933 Act and Section 10(b) of the 1934 Securities Exchange Act (the 1934 Act), and Rule 10b-5, 17 C.F.R. § 240.10b-5. The SEC requested the named defendants cease engaging in these activities and offer rescission to public investors who had purchased the 1970 POC. Subsequently, on February 16, 1971, *The Wall Street Journal* published an article about the SEC investigation and allegations.

On April 23, 1971, upon defendants' consent, the district court entered a final judgment permanently enjoining defendants from engaging in the activities specified in the complaint and ordering defendants to make an offer to all 1970 POC participants to return the purchase price plus a pro-rata share of all income earned on the subscription from the date of purchase payment to the date of repayment. (Exh. RD 659). To effect this remedy, the court designated the First National Bank and Trust Company of Tulsa, Oklahoma, trustee of the rescission fund. On April 30, 1971, the trustee mailed each participant in the 1970 POC a copy of the final judgment and a Rescission Offer Prospectus.

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[4] The SEC's discovery of these Black Books or Program Books was one red flag which triggered the 1970 SEC investigation. The Black Books were not registered with the SEC but were mailed to all POC participants. Program Books contained descriptions of specific oil recovery programs, estimates of projected returns, projected program budgets, etc.

[5] For example, the 1970 POC involved the development of certain Venezuelan oil reserves, a highly risky venture given Venezuela's threat to nationalize the industry. Home-Stake represented that it would indemnify 1970 POC purchasers in the event of expropriation.

(Exh. RD 410). Of the more than 900 investors in the 1970 POC, 279 elected rescission.

According to plaintiffs' theory, the SEC investigation and suit never exposed the root of Home-Stake's fraudulent operation. They claimed further the resulting settlement and Rescission Offer not only incorporated the continuing fraud but also clothed subsequent activities in the mantle of legitimacy. Home-Stake organized and sold a 1971 and 1972 POC. In 1973, the IRS and SEC again undertook investigations of Home-Stake. Inevitably, Home-Stake's money ran out, its scheme collapsed, and on September 20, 1973, Home-Stake filed a petition for reorganization under Chapter X of the Bankruptcy Act of 1938. *The Wall Street Journal* reported the event on September 20, 1973.

**II. Prior Proceedings**

In 1975, after the first amended complaint was filed (Anixter I),[6] the United States District Court for the Northern District of Oklahoma[7] first addressed the statute of limitations issue raised in various defendants' motions to dismiss. *In re Home-Stake Prod. Co. Sec. Litig.*, 76 F.R.D. 337 (N.D. Okla. 1975). In that order, the court held the one-year/three-year limitations periods in Section 13 of the 1933 Act, 15 U.S.C. § 77m, "should be tolled in the interests of substantial justice by reason of the extraordinary

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[6] Plaintiffs amended the Anixter Action on May 24, 1974, and designated this first amended complaint as Anixter I. Anixter I added plaintiff classes for the 1964 and 1972 POCs and certain defendants. Defendants, Kothe & Eagleton, Inc., a Tulsa law firm (K & E), and Norman C. Cross, a Tulsa accountant, doing business as Cross & Co., were also named in Anixter I.

[7] Judge George H. Boldt, Senior United States Judge for the District of Washington, presided by designation over the early stages of the action. Later, Judge H. Dale Cook of the Northern District of Oklahoma was assigned the case, followed by Judge Manuel Real of the Northern District of California, who sat by designation and handled most of the pretrial matters. Judge Real tried the case.

facts and circumstances alleged by plaintiffs." *Id.* at 344. To reach this conclusion, the court cited the unusual circumstance of the duration of the fraudulent scheme spanning a ten-year period, exacerbated by Home-Stake's additional fraud on the courts [8] and the SEC.[9] Surely, the court reasoned, these facts mandated applying the equitable principle of tolling to the statute of limitations to prevent defendants from further benefiting from their successful fraudulent concealment and victimizing the investors, the courts, and the SEC. To support this analysis, the court relied on the discovery rule in the doctrine of fraudulent concealment as enunciated in *Bailey v. Glover*, 88 U.S. 342 (1874), and *Holmberg v. Armbrecht*, 327 U.S. 392 (1946).[10] *Holmberg*'s pronouncement that "[t]his equitable doctrine is read into every federal statute of limitation," 327 U.S. at 397, was reinforced, the district court noted, by subsequent authority establishing that even when Congress announces a limitations period, the federal courts are not powerless "to hold that the statute of limitations is tolled under cer-

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[8] The court cited Home-Stake's settling the 1968 *George H. McFadden* class action as an example of fraud on the court.

[9] The court observed that Home-Stake "conceded technical violations of the securities laws, but failed to disclose that little or no oil from its prior programs had been produced, that its 1965 through 1969 programs had been oversold, or that the assets of its financial statement were nonexistent and that Home-Stake was insolvent." 76 F.R.D. at 342.

[10] In *Holmberg*, the Court refused to apply the state statute of limitations to an action to enforce a federally created equitable right, reminding:

> And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

327 U.S. at 397 (quoting *Bailey v. Glover*, 88 U.S. 342, 348 (1874)).

tain circumstances not inconsistent with the legislative purpose," quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974); *see also Exploration Co. v. United States*, 247 U.S. 435 (1918). Read in this light, Section 13 did not disclose a congressional intent to ignore equitable principles, the district court surmised. Indeed, it observed, "[t]his Court is cognizant that no legislative history is available to indicate whether Congress intended Section 13 to be an absolute bar to actions under Sections 11 and 12(2) when a defendant has fraudulently concealed his scheme for more than three years." *In re Home-Stake*, 76 F.R.D. at 344.[11] The district court concluded neither the one-year nor three-year limitations barred the action.[12]

Moreover, the district court held the later amendment adding certain defendants in Anixter I was proper because

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[11] While acknowledging neither *Bailey*, 88 U.S. at 342, nor *Holmberg* involved Section 13, the district court believed the wording of the limitations at issue in these cases was "equally as absolute." 76 F.R.D. at 344. In *Holmberg*, because there was no federal statute of limitations governing claims under the Federal Farm Loan Act, the question was whether to read the equitable doctrine into the borrowed state statute of limitations. The *Holmberg* court, however, stated, "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive. *The rub comes when Congress is silent.*" 327 U.S. at 395 (emphasis added). The statute of limitations in *Bailey*, 88 U.S. at 342, was contained in the Bankrupt Act of 1867:

> [B]ut no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person *claiming* an adverse interest, touching the property or rights of property aforesaid, in any court whatsoever, unless the same shall be brought *within two years from the time of the cause of action accrued for or against such assignee.*

(quoted by the Court in *Bailey*, 88 U.S. at 344). The Court stated that concealed fraud is an exception on purely equitable principles, "provided suit is brought within proper time after the discovery of the fraud." *Id.* at 348.

[12] At that stage of the pretrial proceedings, the district court appeared reluctant to dismiss the case given plaintiffs' factual allegations.

it related back to the timely filing of the Anixter Action under Fed. R. Civ. P. 15(c). Finding defendants added in May 1974 were given fair notice of the action and would not be prejudiced by their late entry, the district court concluded that a liberal application of Rule 15(c) permitted amending the pleadings where the new claims and defendants were "related to the alleged ongoing scheme to defraud Home-Stake investors." *Id.* at 346.

Thus preserved for a trial which was not to begin for another thirteen years, the question of the statute of limitations was conjoined with that of liability in a bifurcated proceeding.[13] The jury returned interrogatories on the questions of equitable tolling and equitable estoppel.[14] In a subsequent order, the district court held, as a matter of law, that plaintiffs did not discover nor should have discovered by the exercise of reasonable diligence the violations until September 1973, presumably when Home-Stake filed for bankruptcy reorganization, and thus were not time-barred under Section 13 "because of defendants' fraudulent concealment of plaintiffs' causes of action and the doctrine of equitable tolling." (Order, Oct. 17, 1988, Tab 2597). Alternatively, the court held defendants equitably estopped from raising the defense of the statute of limitations based on the jury's findings that defendants "intentionally thwarted

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[13] In its pretrial order of January 28, 1987, [sic] the district court rescinded its prior bifurcation order and ruled that the question of the statute of limitations would not be tried separately.

[14] The interrogatories on equitable estoppel asked the jury to decide whether plaintiffs had proved by a preponderance of evidence that a particular class representative, individually and as a representative of the class, "did not discover nor should have discovered by the exercise of reasonable diligence" that by September 1973, the defendant violated, for example, Rule 10b-5. Alternative dates were also listed. The special interrogatories on equitable estoppel asked the jury whether each defendant "intended to and did thwart and defeat" the federal courts, the IRS, and SEC in their respective judicial and administrative purposes.

and defeated the federal courts, the SEC, and the IRS in their efforts to administer and enforce the laws of the United States. . . ." *Id.* The district court later denied defendants' motion for an interlocutory appeal on the issue of the statute of limitations. (Order, Nov. 16, 1988, Tab 1609).

In this appeal, joint defendants, Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr.; Cross and Company; Kothe & Eagleton, Inc.; and E.M. Kunkel; and individual defendants, Robert S. Trippet, pro se, formerly chief executive officer of Home-Stake; and Frank Sims, pro se, formerly Home-Stake vice-president, challenge these orders. Although numerous issues are raised, the application of the statute of limitations is dispositive.

### III. Section 13

Time and zealous lawyering have unnecessarily obfuscated the limitations issue before us, blending distinct and discrete doctrines into a fungibility that creates an exception to Section 13 that virtually swallows the rule.[15] It is time to set the matter straight and attempt to restore this case to its proper place in securities jurisprudence. Our task

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[15] We note parenthetically that *In re Home-Stake* is recognized in the treatises as the "sole exception" to the three-year absolute bar under Section 13. 3A H. Bloomenthal, *Securities and Federal Corporate Law* § 8.31[3][m], at 8-156.62 (1991) (hereinafter Bloomenthal); *see also* 1 T. Hazen, *The Law of Securities Regulation* § 7.5.4, at 341 (2d ed. 1990) (hereinafter Hazen); 5 A. Bromberg & L. Lowenfels, *Securities Fraud & Commodities Fraud* § 11.9(200), at 11:204 (1990) (hereinafter Bromberg). Similar distinctions appear in case law. *Home-Stake*'s application of equitable tolling has been distinguished on the ground that the fraud was singularly pervasive and long-standing. *Gale v. Great Southwestern Exploration*, 599 F. Supp. 55, 57 (N.D. Okla. 1984). Alternatively, *Home-Stake* is cited for its application of equitable estoppel to Section 13. For example, *Zola v. Gordon*, 685 F. Supp. 354, 361 (S.D.N.Y. 1988), concluded that since equitable tolling could not overcome the three-year absolute bar, the case must stand for the proposition that equitable estoppel could trump Section 13.

has been simplified and the result bolstered by the Supreme Court's recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ S. Ct. ___ , (1991) WL 105240, June 20, 1991) (hereinafter *Lampf, Pleva*).

We, then, begin at the beginning [16] with the language of Section 13, 15 U.S.C. § 77m, the statute of limitations for express causes of action under Sections 11, 12:

> No action shall be maintained to enforce any liability created under section 11 or 12(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 12(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 11 or 12(1) of this title more than three years after the security was bona fide offered to the public, or under section 12 [sic] of this title more than three years after the sale.

Section 13 sets forth a statute of limitations framed by a statute of repose.[17] Under this provision, plaintiffs have one year from the date of discovery of a violation to file an action. Defendants who may be liable for such a violation, however, are safe from any liability arising from the violation if the action is not brought within three years of the violation itself. Three undisputed principles exist within

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[16] "Begin at the beginning," the King said, very gravely, "and go on till you come to the end: then stop." Lewis Carroll, *Alice's Adventures in Wonderland*.

[17] At the outset, we acknowledge the considerable discussions in the case law and commentary on Section 13 as a statute of limitations, a statute of repose, or a combination of the two. *E.g.*, 1 T. Hazen, § 7.5.4, at 335. Although the two concepts differ, the terminology has become interchangeable.

the statute. First, Section 13 is clear on its face: discovery starts the one-year limitation running. Second, the phrasing of the discovery rule incorporates the doctrine of fraudulent concealment, pegging accrual of the cause of action for a concealed fraud to the date "after such discovery should have been made by the exercise of reasonable diligence." [18] Third, while the Section 13 discovery rule incorporates the doctrine of fraudulent concealment, the one-year-after-discovery provision will be extended "in no event . . . more than three years after the security was bona fide offered to the public, or . . . after the sale." 15 U.S.C. § 77m.

The one-year/three-year provisions are not disjunctive. If a putative plaintiff knows or comes to know of the existence of an actionable violation, this person must file suit within one year of the day of discovery. If a putative plaintiff *should* have discovered the cause of action, suit must be filed within one year of the day the discovery should have been made. If discovery does not occur or should not have occurred within three years of the date a "security was bona fide offered to the public," the cause of action lapses and cannot be enforced for any reason. To comply with Section 13, the plaintiff must "plead and prove facts showing that his claim was timely with respect to both the one year and three year limitations periods." J. Hicks, *Civil Liabilities: Enforcement & Litigation Under the 1933 Act* § 6.10[1], at 6-274 (1989).

What is critical to understanding Section 13 as a statute of repose, particularly in light of this case, is the recognition that, as such, not only is the remedy barred, but, also, the liability itself is extinguished. "Section 13 is substantive, rather than procedural; it establishe[s] an essential ingre-

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[18] In *Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978), the court observed, "The doctrine of fraudulent concealment is the common law counterpart of the 'discovery' standard prescribed by § 13 to limit actions brought under § 12(2) of the 1933 Act. Thus, the running of both statutes of limitations is triggered by identical considerations."

dient to a private cause of action." *Id.* Thus, an untimely complaint must be dismissed as a matter of law.

Although this reading is clear from the language of Section 13, the legislative history reinforces the "conclusion that the three-year period is an outside absolute period." 3A H. Bloomenthal, *Securities and Federal Corporate Law* § 8.31[3][m], at 8-156.61 (1991) (hereinafter Bloomenthal).[19] The Congressional Record memorializes the Senate debate focusing on whether to include one or two limitations periods and the lengths of those periods. *See* 1 *Federal Securities Laws—Legislative History 1933-1982* (1983) prepared by the Securities Law Committee of the Federal Bar Association.[20] What concerned Senator Norris about the two limitations periods was their delaying effect on settling cases which otherwise would have to be filed immediately upon discovery of the fraud. Senator Byrne, however, who argued for the two limits with an absolute outer bar, noted that since Section 12 litigation might involve corporate directors, "it would deter men from serving on boards of directors, because the man might die and his estate would be liable possibly 8 years after his death to a suit brought by an individual." *Id.* at 1010. The record of the debate establishes an awareness of the difference between easily discovering a fraud and the more difficult problem when the fraud has been concealed. However, there was no disagreement over the need for an absolute bar. As Senator Barkley stated, "As I said, I am not concerned with whether the limit is fixed at 1 year or 2 years after the discovery, but I think there ought to be a limitation after the discovery has been made with the limit of 5 years." *Id.* at 1011. Senator Bark-

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[19] Albeit resort to legislative history is unnecessary when the statute is clear on its face, *United States v. Oregon*, 366 U.S. 643, 648 (1961), it is particularly helpful here to understand the import of the language at issue.

[20] Contrary to the district court's surmise, the legislative history is remarkably complete and helpful.

ley also observed, "I think we have to consider this proposed statute of limitations in a little different light from that in which we consider ordinary statutes of limitations." *Id.* The 1933 Act included the one-year/five-year scheme, which was amended in 1934, shortening the five-year outer limit to three years.

Of this debate, Judge Easterbrook remarked, "The legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year rule was to be absolute." *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987). Indeed, in quoting portions of this debate, the Second Circuit opined, it even "strongly suggests that Congress, if it had provided an express right of action under §§ 10(b) and 14, would have adopted a one-year/three-year period." *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 363 (2d Cir. 1990).[21]

Thus, under Section 13, if a plaintiff has notice of a violation, the one-year limitation is triggered. If plaintiff has no notice, Section 13 functions as a statute of repose, and the violation is actionable only within the three years subsequent to the date of offering. Consequently, no concept of equitable tolling can have validity beyond the three-year period of repose because Congress did not allow for breaching the Chinese Wall it intentionally created. Only this construct "is consonant with the legislative scheme." *American Pipe & Constr. Co.*, 414 U.S. 538, at 558. As the court noted in *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1395 (7th Cir. 1990):

> Courts say that equitable tolling does not apply under § 13, but this is not strictly accurate. It is better to

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[21] In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ S. Ct. ___ (1991 WL 105240, June 20, 1991), the Court noted this observation with approval.

> say that equitable tolling and related doctrines do not extend the period of limitations by more than the two-year grace period § 13 allows. Congress did not obliterate these valuable doctrines so much as it set bounds on the length of delay.[22]

While equitable tolling focuses on when the statute of limitations begins to run, "[e]quitable estoppel acknowledges that the statute has run, but is invoked to estop the defendant from asserting that defense because a defendant's actions lulled a plaintiff into forbearing bringing suit within the period of limitations." 3A Bloomenthal, § 8.31[3][o], at 8-156.68. We have noted "[e]quitable estoppel arises where the parties recognize the basis for suit, but the wrongdoer prevails upon the other to forgo enforcing his right until the statutory time has lapsed." *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 n.7 (10th Cir. 1980).[23] Indeed, the congressional debate addressed the problem of parties' attempting to settle or negotiate a claimed violation in the face of the unfairness of the running of the limitations period. Emphatically, Congress opted for the absolute bar.

While there may be circumscribed settings in which the doctrine of equitable estoppel might apply[24] to claims gov-

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[22] In its recent ruling under Section 10(b), the Court has bolstered this conclusion. "Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." *Lampf, Pleva*, ___ S. Ct. ___ (1991 WL 105240).

[23] In this same footnote, the *Aldrich* court agreed with the Seventh Circuit in *Bomba v. W.L. Belvidere, Inc.*, 579 F.2d 1067, 1070 (7th Cir. 1978), which had stated, "equitable estoppel may prevent reliance on a statute of limitations which nevertheless cannot be tolled by other equitable principles." *Aldrich*, in dicta, however, only left "open the possibility of equitable estoppel" but stated that under the limitations provision of the Interstate Land Sales Full Disclosure Act (ILSFDA), equitable tolling could not extend suit past the three-year bar. *Aldrich v. McCulloch Properties*, 627 F.2d 1036, 1043 n.7 (10th Cir.1980).

[24] *Katz v. Amos Treat & Co.*, 411 F.2d 1046 (2d Cir. 1969), is such a case. In another, *Bomba*, 579 F.2d at 1067, a case under the ILSFDA,

erned by Section 13,[25] we believe the more accurate analysis excludes the application of this doctrine when the consequence operates to trump a clear outer limit intended by Congress. "Unless the 'in no event more than three' language cuts off claims of tolling and estoppel at three years, however, it serves no purpose at all – what other function could be served by such language in a statute that starts the time on discovery?" *Short v. Belleville Shoe*, 908 F.2d at 1391.[26] We therefore conclude that the doctrine of equitable estoppel is not available to avoid the statute of repose established by Section 13.[27]

Indeed, except for *Home-Stake*,[28] there is virtual uniformity in holding the three-year limit as an absolute bar to

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which contains a similarly worded statute of limitations, defendant promised to refund plaintiffs' purchase money for two lots on which defendant had failed to produce the proper reports. Although he offered rescission, defendant never fulfilled his promise to pay until after the statute of limitations had run. Under *Bomba*, "absent some affirmative indication that Congress expressly intended to exclude the application of equitable estoppel," *id.* at 1070, the federal doctrine may be read into every federal cause of action. *See Cange v. Stotler and Co.*, 826 F.2d 581 (7th Cir. 1987) (equitable estoppel applies to actions under Commodity Exchange Act).

[25] In his treatise, Bloomenthal attempts to delineate conduct other than that involved in the underlying claim as the distinguishing factor. 3A Bloomenthal, § 8.31[3][o], at 8-156.68. Nevertheless, given the bright line Congress set down, we believe the more consistent approach must reject infiltrating these equitable doctrines into Section 13. There is simply no other way to read Section 13 and preserve its meaning.

[26] In dicta, the Seventh Circuit left open the question whether equitable estoppel could postpone the running of the one-year period after discovery but was emphatic about the consequence of the three-year outer limit.

[27] Although *Lampf, Pleva* did not address this issue, its holding the doctrine of equitable tolling inapplicable to the one-year/three-year limitary structure would necessarily foreclose application of equitable estoppel as well.

[28] Plaintiffs also rely on *Katz v. Amos Treat & Co.*, 411 F.2d at 1046, which is typically cited for its atypical reading of § 13. In that case,

suit. *See, e.g., Short v. Belleville Shoe*, 908 F.2d at 1393; *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1308 (9th Cir. 1982); *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. Unit B Dec. 1981), *cert. denied*, 458 U.S. 1106 (1982).[29] This harmony effectuates the remedial scheme created to enforce the rights given by the 1933 Act.

In the Anixter Action, plaintiffs alleged they did not discover defendants' fraud until March 1973. Nevertheless, without notice, plaintiffs had only three years from the date plaintiffs purchased their POCs in which to file suit. Thus, we conclude as a matter of law, plaintiff class representatives for the 1964, 1965, 1966, 1967, 1968 and 1969 POCs, William Dennler, John D. Lockton, Ted Westfall, William Mortenson, William D. Robertson, and Thomas Thorner, respectively, were barred from suit by the three-year statute of repose.[30] Neither equitable tolling nor equitable estoppel can salvage their claims.

The more difficult issue remains, however, whether suit was timely filed by the 1970, 1971, and 1972 class repre-

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which is typically cited for its atypical reading of § 13. In that case, plaintiff purchased unregistered securities in 1960 upon the assurance the securities would soon be registered. Although plaintiff did not file the action under § 12(1) until 1962, the court did not foreclose suit on the ground that defendant's continued assurances that the securities would be registered abated the notice date.

[29] During oral argument, counsel for plaintiffs stated he was unaware of any case characterizing Section 13 as a statute of repose, making it "self-operative" to extinguish liability. "I am not aware of any such case that holds that, and I don't see any policy reason why this court should do it, I don't see why this court should reach out and try and make Section 13 such a draconian provision." Transcript of Oral Argument, at p.64.

[30] Although we shall discuss the statute of limitations for their claims under Rule 10b-5, these plaintiffs failed to timely preserve that action as well. In this group, we also include the individual actions appended to the nine class actions when all of these suits were consolidated. *See* Pretrial Order, Jan. 29, 1988, Tab PTO, pp. 7-12.

sentatives, William Grohne, Beatrice Warren,[31] and Joseph C. Bennett. That question can only be answered by determining when plaintiffs knew or should have known with the exercise of diligence that fraud was afoot.

In the original complaint [32] plaintiffs alleged fraudulent concealment:

> Plaintiffs had no knowledge of the alleged combination and conspiracy or any facts which might have led to the discovery thereof until March of 1973, at which time plaintiffs were informed that the Internal Revenue Service had determined that Home-Stake Production Company had not expended funds received by it for the purpose of conducting intangible drilling, but had converted these funds to its own uses. Plaintiffs could not have uncovered the combination and conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful acts had been fraudulently concealed by defendants through its resort to secrecy to avoid detection, by its repeated statements that substantial oil production was being achieved for each of the programs and the payments which the participants received with respect to their program investments which purported to be income from the production of oil.

This allegation was revised in successive amended complaints and later subtitled, Equitable Tolling:

> By reason of the extraordinary nature of the facts alleged above . . . and in order to fully effectuate the purposes of the Securities Acts the statute of limitations applicable to the causes of actions brought herein

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[31] The original representative for the 1971 POC, Beverly Warren, died, and his widow became the class representative.

[32] Although the original complaint was not included in the record, the court, on its own motion, requested supplementing the record.

should be tolled at least until September 20, 1973 based upon established principles of equity.

Our analysis has been complicated by the paucity of specific evidence provided in the record to delineate when specific claims arose.[33] Nevertheless, because the district court applied both equitable doctrines to these claims as well, we are constrained to presume the court found the statute of limitations had run. However, while this observation may explain the preservation of the 1964 through 1969 suits when they were clearly barred, it remains insufficient to understand why the 1970, 1971, and 1972 suits survived the statutory discovery rule but now must fail.

Notice is the key to our analysis, and merely "inquiry notice" will do. *DeBruyne v. Equitable Life Assur. Soc. of the United States*, 920 F.2d 457, 466 (7th Cir. 1990). The discovery period, "one year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence," does not "commence only when a plaintiff has full knowledge of the existence of a claim. On the contrary, the one-year limitations period begins to run even when a plaintiff is placed on 'inquiry notice' of possible misrepresentations." *Id.* at 466 (citations omitted). The Seventh Circuit has characterized those facts triggering inquiry notice as "sufficient storm warnings to alert a reasonable person to the possibility that there were either misleading statements or significant omissions involved in the sale." *Cook v. Avien, Inc.*, 573 F.2d 685, 697 (1st Cir. 1978).

*Kennedy v. Josephthal & Co.*, 814 F.2d 798 (1st Cir. 1987), is instructive. In that case, plaintiffs purchased shares of a limited partnership involved in the mining and sale of coal. The Offering Memorandum indicated not only the high

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[33] For example, we find no cancelled checks or other documentation to establish when each class representative actually purchased an interest.

degree of risk but also, given all the risks and contingencies, the partnership "would, in all likelihood, utterly fail as a viable coal mining operation." *Id.* at 801. In the face of these written representations, plaintiffs claimed to rely on the oral statements of defendant's representative limning a more positive, profitable, and safe venture. Recognizing plaintiffs may have had mixed motives in their purchase, including that of a tax shelter which "[is] sometimes more useful to investors than another real investment," *id.* at 801-02, the court nevertheless exacted an objective standard of reasonable diligence. In response to plaintiffs' claim they could not have discovered the fraud earlier because of defendants' continuing fraudulent misrepresentations and omissions, the court instructed, "Appellants need not, however, have fully discovered the nature and extent of the fraud before they were on notice that something may have been amiss. Inquiry notice is triggered by evidence of the possibility of fraud, not full exposition of the scam itself." *Id.* at 802.[34] *See also State of Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981).

Thus, Section 13 holds plaintiffs to a stringent standard of proof.[35] *Toombs v. Leone*, 777 F.2d 465, 468 (9th Cir. 1985). Against this standard, plaintiffs, who had purchased securities from 1970 through 1972, averred they were placed on notice in March 1973 when the IRS represented it would disallow their IDC deductions upon its discovery that Home-Stake had not expended funds on drilling wells. To accept

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[34] The court found appellants were on inquiry notice at the time they examined the Offering Memorandum and compared it to their broker's conflicting statements. Having purchased their securities in December 1979, appellants thus had to sue by December 1980. Their 1981 suit was untimely.

[35] In his treatise, Bromberg states, "By charging plaintiff with constructive knowledge, § 13 is stricter than his basic cause of action under either §§ 11 or 12(2), which charges him only with actual knowledge." 4 Bromberg, § 8.4(318), at 204.16.

this event to constitute plaintiffs' inquiry notice, we would have to ignore the fact that the SEC filed a complaint in February 1971 alleging violations of the registration and antifraud provisions of the securities laws, after which each plaintiff received notice of the court order and rescission remedy.[36] Surely, the order, the Rescission Offer, and *The Wall Street Journal* article of February 11, 1971, represent "great glowering clouds," *Kennedy v. Josephthal*, 814 F.2d at 802, sufficient to put plaintiffs on notice that something was amiss. *See also Bush v. Rewald*, 619 F. Supp. 585, 602 (D. Haw. 1985).

The Rescission Offer told recipients to "rely *solely* on the information contained in this prospectus." (Exh. RD 410) (emphasis added). All other information was to be "disregarded entirely." The document stated:

> BY THIS PROSPECTUS HOME-STAKE 1970 PROGRAM OPERATING CORPORATION ("OPERATOR") HEREBY OFFERS TO RESCIND ALL PAYMENTS MADE BY PARTICIPANTS ON UNITS OF PARTICIPATION ("UNITS") IN ACCORDANCE WITH THE CONSENT DECREE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA MORE FULLY DESCRIBED UNDER THE HEADING "RESCISSION OFFER" HEREIN. UNDER THE TERMS OF THE OFFER, PARTICIPANTS MAY ELECT TO RECEIVE THE RETURN OF THEIR PAYMENTS MADE IN 1970 AGGREGATING $23,080,000 FOR SUBSCRIBED UNITS PLUS INTEREST, AS MORE FULLY DESCRIBED UNDER THE HEADING "RESCISSION OFFER" HEREIN.

Investors were offered the return of their investment plus interest. In contrast to all of these written materials, R.S.

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[36] Purchasers of the 1971 POC had notice of the Rescission Offer in the 1971 Prospectus. We recognize William Bennett, the 1972 class representative, did not receive that specific notice. However, the record reflects he read the 1972 Prospectus which contained information about the 1971 SEC action and settlement, and made inquiry.

Trippet, Home-Stake's CEO, wrote his own memos trivializing the investigation and suit and castigating the SEC.[37] Against these representations, individual investors made their own decisions based as much on tax considerations as investment concerns.

For example, William Grohne, the 1970 class representative, acknowledged he received the Rescission Offer and considered it. He decided not to rescind because it would have cost him $2,000 in additional taxes. (R. XV, 1809). Although he was concerned that programs were going forward without seeing his quarterly payments reflect increases from the larger oil production, he did not act.

Beverly Warren, a retired business executive who represented the 1971 class,[38] stated he scanned the Rescission Prospectus and thought it looked only "a little more severe" than a normal risk prospectus. (R. XVI, 1919). Acknowledging the high degree of risk involved in these ventures, he stated his decision to purchase a POC was based on both the investment and tax advantages, although without

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[37] One Trippet memorandum referred to the government's tyranny in investigating and muzzling Home-Stake. The "Tale of Two Cities," Washington, D.C., and Tulsa, Oklahoma, Trippet wrote, continued to reveal "the tyranny of the state over the individual." (Exh. DX 169). In another letter to Thomas Thorner, the 1969 class representative, Trippet explained that the word "fraud" was used to produce an "emotional semantic reaction to its own advantage to evoke Pavlovian responses in the readers and listeners when it uses the same word." (Exh. DX 167). Trippet, characterizing the alleged violations as technical, categorically denied them "except for a couple of the parking ticket variety," and called the SEC's oil reserve estimates misleading, made by SEC "testifying engineers" who are "poor-as-church-mice punks making about $18,000 per year and lucky to be doing that, because they can't make anyone's team." (Exh. DX 167).

[38] As noted earlier, at the time of trial, Mr. Warren was deceased. His deposition was read into the record. Mr. Warren had purchased units in the 1964, 1965, 1966, 1967 and 1968 POCs, three units in the 1969 POC, two units in the 1970 POC, three units in 1971, and three units in 1972.

the tax incentives, he would not have invested. (R. XVI, 1936).

Finally, Joseph Bennett, the 1972 class representative, with undergraduate and graduate degrees in mineral engineering and mineral economics, first learned of the Home-Stake program in October 1972 while exploring investments which would have the additional feature of deductibility to offset a 1972 stock bonus he had received. Asked on direct examination if he had read the information in the 1972 Prospectus about the 1971 legal proceedings, Mr. Bennett responded he considered it a hurdle to overcome before committing to the investment. After speaking to his broker, he concluded Home-Stake had gotten its wrist slapped for aggressive overselling of the 1970 POC but was convinced the SEC was satisfied. (R. XV, 1755). Like other Home-Stake investors, Mr. Bennett's income was substantial. At his 60-65% tax bracket, a $20,000 investment would, he said, provide $13,000 in tax savings although he understood the oil and gas business involved a high degree of risk.

Attempting to place this individual testimony on the larger stage of the ongoing plot, plaintiffs postulate the underlying Ponzi scheme was concealed by more intricate machinations to deceive the SEC and the United States District Court for the District of Columbia. When an investor, in fact, became suspicious, plaintiffs urge, Home-Stake bought him out or permitted him to roll the investment over into another POC.[39] Discovery was impossible until the entire scheme collapsed, they argued.

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[39] Although plaintiffs insist the evidence of settling claims was integral to the continuing scheme to defraud, we think it cuts both ways. Alternatively, this evidence could show Home-Stake simply wanted to satisfy its investors. Once recompensed, what interest did the investor have in sleuthing the scam? Moreover, the investor received generally what he would have from filing suit, recovery of the consideration paid plus interest. The only flaw in this approach was that the money ran out. In neither case, however, does equitable estoppel translate this conduct into a fraud on the court. If an investor chooses to settle his case, that choice, without more, is not fraudulent.

According to plaintiffs' theory, when defendants' fraud was passive, that is in the manipulation of the Ponzi scheme itself, equitable tolling suspended the statute of limitations until Home-Stake collapsed. Alternatively, plaintiffs asserted, and the court apparently embraced, the theory that the doctrine of equitable estoppel redressed defendants' active fraud in deceiving the SEC, IRS, and courts.[40] Fueling application of either doctrine, they insist, is the uniqueness of the facts of this case, a debacle that Section 13 could not have contemplated.

However, the uniqueness of Home-Stake's fraud does not mandate a different application of Section 13 when plaintiffs seek express securities remedies. At the very core of fraud is an act of concealment. Were we to follow plaintiffs' argument to its logical conclusion, there would be no statute of limitations in a fraud action because of the perpetrator's essential need to escape detection. That is why Congress enacted a statute of repose. Moreover, carving out a special exception to Section 13 for a "secondary act" of fraud or "active concealment" would eliminate the one-year statute of limitations and entirely nullify the effect of the statute of repose.

Instead, Section 13 exacts more of the prudent investor. "After the plaintiff has notice, there is a strong federal interest in requiring him to file suit quickly." *Roberts v. Magnetic Metals Co.*, 611 F.2d 450, 463 (3d Cir. 1979) (Seitz, C.J., dissenting), quoted in *In re Data Access Systems Sec. Litig.*, 843 F.2d 1537, 1546 (3d Cir.), *cert. denied, sub nom. Vitiello v. I. Kahlowski & Co.*, 488 U.S. 849 (1988).

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[40] Plaintiffs continually refer to defendants' fraud on the "courts" without specifying the act of fraud on the particular court. Moreover, their use of the terminology "fraud on the court" is quite generic, encompassing actions between parties unrelated to a court proceeding. However, "[f]raud on the court (other than fraud as to jurisdiction) is fraud which is directed to the judicial machinery itself and is not fraud between the parties or fraudulent documents, false statements or perjury." *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985).

The SEC provided notice to Home-Stake investors that certain violations of the securities laws were alleged, and based on those violations, Home-Stake agreed to rescind the 1970 POC. In the face of that information, individual investors, as already noted, made their own calculations, perhaps based on the Rescission Prospectus or R.S. Trippet's assurances. However, Section 13 does not contemplate weighing individual investment concerns and tax considerations. "Prudent investors almost always can sniff out fraud (or enough smoke to justify litigation) within three years. Section 13 cuts off only the claims of the most trusting or somnolent—or the most wily, those who wanted to wait as long as possible." *Short v. Belleville Shoe*, 908 F.2d at 1392.

The claims of class representatives William Grohne, 1970 POC, and Beverly Warren, 1971 POC, were included in the March 1973 complaint. Although each knew about the 1971 SEC investigation and settlement, both chose neither to investigate further nor to rescind based on personal investment decisions. Nevertheless, for each, the one-year discovery period must begin to run from April 30, 1971, when notice of the court's order and the Rescission Offer was sent. However incomplete that notice might have been, as plaintiffs allege, it encompassed enough of a "storm warning" to start the clock as a matter of law. Their complaint, filed on March 30, 1973, was thus untimely.

Consequently, Joseph Bennett's claim, added by amendment to the Anixter Action on May 24, 1974, is tethered to a nullity. Indeed, had the Anixter Action been timely, Mr. Bennett would have had one year from its filing or until March 30, 1974, to have filed his complaint on time. Surely the filing of the Anixter Action was notice sufficient to trigger the one-year statute of limitations. *Peterson, Lowry*, 651 F.2d at 687.

**IV. Section 10(b)**

Defendants challenged plaintiffs' Section 10(b) and Rule 10b-5 claims as untimely under both the Oklahoma statute

of limitations for fraud and the one-year/three-year uniform federal scheme, as announced by the Third Circuit in *Data Access*, 843 F.2d 1537. Our disposition of this issue is now guided by the Supreme Court's recent decision resolving a split among the Circuits over whether the state borrowing doctrine is the appropriate vehicle for determining the limitary period for implied federal securities causes of action. *Lampf, Pleva*, ___ S. Ct. ___ (1991 WL 105240). The Court concluded the proper limitations period for Section 10(b) and Rule 10b-5 claims is the more closely analogous uniform federal period for express causes of action contained in the 1933 and 1934 Acts.

In *Lampf, Pleva*, from 1979 through 1981, plaintiffs invested in certain limited partnerships to develop computer hardware and software with "the expectation of realizing federal income tax benefits therefrom." *Id.* The partnerships failed, and in 1982 and 1983, the IRS notified plaintiffs of its investigation of the partnerships. Subsequently, the claimed tax benefits were disallowed because of overvaluation of partnership assets and lack of a profit motive. On November 3, 1986, and June 4, 1987, plaintiffs filed complaints in federal court alleging they were induced to invest in the partnerships by misrepresentations in the offering memoranda in violation of Section 10(b) and Rule 10b-5. Plaintiffs stated they only discovered the alleged misrepresentations in 1985 when the IRS disallowed their deductions. The district court disagreed and dismissed their complaints upon finding plaintiffs were on inquiry notice as early as 1982 when they became aware of the possibility of fraud and misconduct in the partnerships. The Ninth Circuit reversed on the ground that unresolved factual issues precluded summary judgment on the question of when plaintiffs discovered or should have discovered the alleged fraud. *Reitz v. Leasing Consultants Assocs.*, 895 F.2d 1418 (9th Cir. 1990).

Reversing the Ninth Circuit, the Supreme Court rejected the long-standing judicial practice of looking to state ana-

logues to a securities fraud action and borrowing the appropriate state statute of limitations for that cause of action. Additionally, the Court rejected the Solicitor General's argument to apply the federal limitation of Section 13 but with the five-year statute of repose established for Section 20A, 15 U.S.C. § 78t-1(b)(4).[41] Instead, the Court reasoned, quoting *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 169 (1983),

> [i]n the present litigation, there can be no doubt that the contemporaneously enacted express remedial provisions represent "a federal statute of limitations actually designed to accommodate a balance of interests very similar to that at stake here—a statute that is, in fact, an analogy to the present lawsuit more apt than any of the suggested state-law parallels."

*Id.* The Court held the one-year/three-year scheme of the 1933 and 1934 Acts was the more appropriate limitations period for Section 10(b).[42]

Furthermore, the Court rejected plaintiffs' argument that the express period would be subject to the doctrine of equitable tolling. "Notwithstanding this venerable principle, it is evident that the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure. . . . The 3-year limit is a period of repose inconsistent with tolling." *Lampf, Pleva*, ___ S. Ct. ___ (1991 WL 105240). Therefore, the Court held plaintiffs' claims were untimely.

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[41] Section 20A(b)(4) of the 1934 Act, added by the Insider Trading and Securities Fraud Enforcement Act of 1988, provides: "No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation."

[42] *Ceres Partners v. GEL Assocs.*, 918 F.2d 349 (2d Cir. 1990); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990); and *In re Data Access Sys. Sec. Litig.*, 843 F.2d 1537 (3d Cir.), *cert. denied, sub nom., Vitiello v. I. Kahlowski & Co.*, 488 U.S. 849 (1988), had reached the same conclusion.

Thus, *Hackbart v. Holmes*, 675 F.2d 1114 (10th Cir. 1982), and *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817 (10th Cir. 1990) (per curiam), no longer govern our analysis of the applicable limitary period for plaintiffs' Section 10(b) claims in our case. Consequently, based on our prior discussion of Section 13 to plaintiffs' express causes of action, we hold plaintiffs' Section 10(b) and Rule 10b-5 claims are untimely and must be dismissed.

## V. Conclusion

In their joint brief and oral argument, plaintiffs urged we compare the levels of inequity in reaching a result in this case. The federal securities scheme sought to ensure full disclosure and prohibit manipulative and deceptive practices, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204-05 (1976), not by comparing levels of inequity but by determining whether the cause of action asserted falls within that remedial scheme. Although our result appears the more draconian given the eighteen years consumed in reaching it, we cannot overlook Congress' clear design in setting that outer limit which ultimately snared plaintiffs' claims. Any alteration of that design is committed solely to the body that enacted it and not the court.

**REVERSED.**

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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**Nos. 90-5040 - 90-5049, 90-5051, 90-5053, 90-5055 - 90-5059, 90-5062 - 90-5067**

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IVAN A. ANIXTER, et al.,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, et al.,
Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr., et al.,
Defendants-Appellants.

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**ORDER ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* AND MOTION OF THE SECURITIES AND EXCHANGE COMMISSION FOR LEAVE TO FILE A MEMORANDUM AS *AMICUS CURIAE***

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Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

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MOORE, Circuit Judge.

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Before us are plaintiffs' petition for rehearing and suggestion for rehearing en banc and the Securities and Exchange Commission's (SEC) motion for leave to file a brief as amicus curiae in support of plaintiffs' petition for re-

hearing. Plaintiffs' petition for rehearing is granted in part in order to clarify our prior opinion to reference the language of Section 9(e) of the Securities Exchange Act of 1934 (the 1934 Act) in accord with the Supreme Court's recent decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___ , 111 S. Ct. 2773 (1991), and to dispose of the issue of the retroactive application of *Lampf, Pleva*. With respect to all other issues raised by plaintiffs, the petition is denied. We grant the SEC's motion for leave to file an amicus brief.

In our prior opinion, we stated, "the one-year/three-year scheme of the 1933 and 1934 Acts was the more appropriate limitations period for Section 10(b)," without specifying § 9(e) of the 1934 Act. *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, ___ (10th Cir. 1991). However, in rejecting Tenth Circuit precedent on the applicable statute of limitations under § 10(b), the order referred to our previous discussion under Section 13 of the Securities Act of 1933 (the 1933 Act), as amended by the 1934 Act, to supply the rationale for dismissing plaintiffs' implied cause of action on statute of limitations grounds. *Id.* We amend that order to include the following discussion.

In deciding to analogize the statute of limitations under § 10(b) of the 1934 Act to one of the express limitary periods found in the 1933 and 1934 Acts, the Court, in *Lampf, Pleva*, noted that each express cause of action included explicit and similar limitations periods. "With only one more restrictive exception,[1] each of these includes some

[1] The more restrictive section, the Court noted, is Section 16(b), 15 U.S.C. § 78p(b), which "sets a 2-year rather than a 3-year period of repose. Because that provision requires the disgorgement of unlawful profits and differs in focus from § 10(b) and from the other express causes of action, we do not find § 16(b) to be an appropriate source from which to borrow a limitations period here." *Lampf, Pleva*, 111 S. Ct. at 2780, n.5. The one-year, three-year designs, the Court stated, were found in Section 9(e) and Section 18(c) of the 1934 Act and Section 13 of the 1933 Act, as amended in 1934.

variation of a 1-year period after discovery combined with a 3-year period of repose." *Id.* at 2780. From among these one-year, three-year provisions and "[t]o the extent that these distinctions in the future might prove significant," *id.* at 2782, n.9, the Court selected § 9(e), 15 U.S.C. § 78i(e) as the "governing standard for an action under § 10(b)." [2] *Id.* In arriving at this conclusion, the Court expressly agreed with "every Court of Appeals that has been called upon to apply a federal statute of limitations to a § 10(b) claim that the express causes of action contained in the 1933 and 1934 Acts provide a more appropriate statute of limitations than does § 20A." *Id.* at 2781.[3]

Despite the Court's recognition of the substantial similarity of the wording of these express limitary periods, plaintiffs contend the slightly different wording of § 9(e), in fact, calls for "actual notice" while the language of § 13 requires only inquiry notice. We find no such distinction; nor did the Court in *Lampf, Pleva.*

Instead, in *Lampf, Pleva*, the Court observed, "Although not identical in language, all these [express statutes of limitations] relate to one year after discovery and to three years after violation." *Id.* at 2777, n.2. When the Court selected § 9(e), it did not necessarily indicate a preference

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[2] Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), states: "No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation."

[3] The Court cited *Ceres Partners v. GEL Assocs.*, 918 F.2d 349 (2d Cir. 1990) (borrowing 1934 Act's one-year/three-year period for express rights of action under §§ 9(e) and 18(A) provides the closer analogy given federal policies underlying federal securities laws); *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991), (borrowing § 13 statute of limitations as the closer analogue for §10(b)); *In re Data Access Systems Sec. Litig.*, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988) (§ 9(e), one year after discovery of facts constituting the violation, and in no event more than three years after such violation, is proper period of limitations).

for the type of notice of the violation[4] but sought a "governing" standard to link the implied § 10(b) remedy to those express securities causes of action which uniformly require one year after notice of the violation and not more than three years after the violation.

Thus, under *Lampf, Pleva*, in overlaying an implied remedy to their express causes of action, plaintiffs were required to show their complaint was timely filed within one year of their notice of the violation, when they knew or should have known, and no later than three years after the violation.[5] Our previous analysis of when plaintiffs were on notice of the violation remains applicable to their §10(b) claims. Indeed, under the analysis set forth in *Lampf, Pleva*, the Anixter plaintiffs' § 10(b) cause of action is, therefore, untimely filed.

Moreover, in *Lampf, Pleva*, after resolving a split in the Circuits, the Court applied the decision to the case before it. On the same day, in *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S. Ct. 2439, 2448 (1991), a plurality opinion, the Court grounded the question of retroactivity "entirely to an issue of choice of law" and stated, "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others

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[4] The Court cited with approval the discussion in *Short v. Belleville Shoe*, 908 F.2d at 1385, which borrowed the § 13 statute of limitations.

[5] Federal law governs when a cause of action accrues. *Rawlings v. Ray*, 312 U.S. 96 (1941). It would appear that the general rule for this determination in federal court is an objective test, knows or should have known; discovers or in the exercise of reasonable diligence should discover, the facts giving rise to the claim. The distinction is often blurred. For example, in *Dzenits v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 (10th Cir. 1974), to decide whether the state statute of limitations had run on a 10(b) claim, the court stated, "[T]he crucial issue of fact with respect to the commencement of the running of the applicable two-year statute of limitations is when the plaintiff actually knew, or in the exercise of reasonable diligence should have known . . . ."

not barred by procedural requirements or res judicata." A week later, the Court granted a writ of certiorari in *Welch v. Cadre Capital*, 923 F.2d 989 (2d Cir. 1991), which had held that *Ceres Partners v. GEL Assocs.*, 918 F.2d 349 (2d Cir. 1990), met "the threshold [Chevron] requirement for nonretroactive application." 923 F.2d at 994. The Court vacated and remanded the case for further consideration in light of the discussion in *James Beam* and *Lampf, Pleva. Northwest Savings Bank v. Welch*, ___ U.S. ___, 111 S. Ct. 2882 (1991). Consequently, the Court has resolved the issue of retroactivity.

Finding no merit in plaintiffs' additional assertions of error, we therefore amend the order as noted and deny the petition for rehearing. The SEC's motion for leave to file a memorandum as amicus curiae is granted.

The suggestion for rehearing en banc was submitted to the entire court in accordance with Fed. R. App. P. 35(b), but no judge in regular active service sought rehearing en banc. Judges Holloway and Seymour did not participate.

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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**No. 90-5040**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD,

Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; NORMAN C. CROSS, JR.,

Defendants-Appellants.

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**No. 90-5041**

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A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. and Helen Burgess; DEWEY J. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B. COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARFF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; E. STARR; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR., TED B. WESTFALL,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFEE, TAFT, MARK, BOND, RUCKS,

AND WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns,

Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; NORMAN C. CROSS, JR.,

Defendants-Appellants.

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**No. 90-5042**

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A.M. ANDERSON; RICHARD J. ANTON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, E.P. Bernuth, Sophie K. Bernuth, Joseph A. Buda, George and Helen Burgess; DEWEY CALI; ROBERT B. COBURN; COBURN & LIBBY, INC.; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; MARGARET C. EVERETT; L.L. FERGUSON; ISADOR H. FINKELSTEIN; H.W. GOULDTHORPE; GEORGE L. HALLER; JACK HANSON; RALPH HART; F.H. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; HOWARD G. KICHERER; ELIZABETH C. KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL MCFALL; JAMES F. MADDEN; ALBERT MANGANELLI; NICHOLAS MARCHESE; STANLEY A. MARKS; C.W. MOELLER; WILLIAM H. MORTENSEN; CARL OLSON; PATRICIA) OLSON; CARL PALERMO; FRANK PALERMO; ROY T. PARKER; HELEN M. REEDER; D.D. SCARFF; M.L. SCARFF; RICHARD SCOTT; LOUIS P. SINGER; WILLIAM R. SMART; J. STANFORD SMITH; G. CURTIS STEWART; PAUL TOWNSEND; VERNON UNDERWOOD;

TED B. WESTFALL; J. HOWARD WOOD; SIDNEY WOOLWICH; MURRAY ZIMMERMAN,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH, JR.; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,
Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of NORMAN C. CROSS, JR.,
Defendant-Appellant.

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**90-5043**

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Marcella McHenry, Merl McHenry, Fred J. Borch, David Breslauer, Joseph A. Buda; DEWEY CALI; JAMES CLARK; MARY CLARK; WILLIAM H. COLQUHOUN; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; L.L. FERGUSON; JACK FINE; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; JAMES J. HAYES; EARL D. HILBURN; DOROTHY C. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; JOHN E. HUTCHINSON, III; HAROLD KAPLAN; W.S. JONES; HOWARD G. KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; D.W. LYNCH; D.B.

LYNCH, DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; ANTHONY MACAGNA; JAMES F. MADDEN; ALBERT MANGANELLI; NICOLAS A. MARCHESE; CHARLES J. MELOUN; C.W. MOELLER; CARL J. OLSON; PATRICIA OLSON; THOMAS O. PAINE; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; HOWARD RUBENSTEIN; D.D. SCARFF; M.L. SCARFF; C.S. SEMPLE; WILLIAM SMART; J. STANFORD SMITH; JANET G. STEWART; GERALD TOOMEY; OLIVER J. TROSTER; H.B. WALDRON, JR.; HUMBERTO ZAVALETA; MURRAY ZIMMERMAN,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM BLUM; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFFE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,

Defendants,

and

WYNEMA ANNA CROSS, as Executrix of the Estate of NORMAN C. CROSS, JR.,

Defendant-Appellant.

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**No. 90-5044**

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IVAN A. ANIXTER; WILLIAM H. DENNLER; JOHN D. LOCKTON; FRANCIS K. MCCUNE; TED B. WESTFALL; WILLIAM H. MORTENSEN; PETER P. LUCE; WILLIAM D. ROBERTSON; BERNARD D. BROEKER; THOMAS H. THORNER; DOLLY YOSHIDA MARTIN; WILLIAM GROHNE; JAMES H. LEACHMAN; BEVERLY H. WARREN; JOSEPH C. BENNETT,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1964 PROGRAM OPERATING CORPORATION; HOME-STATE 1965 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1972 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; H.L. FITZGERALD; H.R. SMITH; FRANK E. SIMS; JOHN T. LENOIR; THOMAS A. LANDRITH; E.M. KUNKEL; JACKSON M. BARTON; MARVIN R. BARNETT; DONALD C. LARRABEE; J.D. METCALFE; H.B. GUTELIUS; CARL A. CLAY; WILLIAM E. MURRAY; MURRAY, PATTERSON & SHARPE; DRYFOOS & COMPANY; MCAFEE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF; SIMPSON THACHER AND BARTLETT; HARRY HELLER; WILLIAM BLUM; RICHARD A.

GANONG; WILLIAM D. LEWIS; LEWIS & GANONG; RICHARD A. GANONG, INC.; NORMAN C. CROSS, JR.; KENT KLINEMAN,

Defendants,

and

CROSS AND COMPANY,

Defendant-Appellant.

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**No. 90-5045**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA; and JOSEPH C. BENNETT, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.; MURRAY, PATTERSON & SHARPE, a partnership; DRYFOOS & COMPANY, a limited partnership; MCAFEE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF, a professional corporation; SIMPSON THACHER AND BARTLETT, a partnership; LEWIS & GANONG, a partnership; WILLIAM E. MURRAY; KENT KLINEMAN; WILLIAM BLUM; HARRY HELLER; RICHARD A.

GANONG; WILLIAM D. LEWIS; JOHN T. LENOIR; CARL E. CLAY; JACKSON M. BARTON; MARVIN R. BARNETT; FRANK E. SIMS; H.R. SMITH; DONALD C. LARRABEE; RICHARD A. GANONG, INC., a corporation,
Defendants,

and

KOTHE & EAGLETON, INC., a professional corporation,
Defendant-Appellant.

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**No. 90-5046**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,
Defendants,

and

E.M. KUNKEL,
Defendant-Appellant.

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**No. 90-5047**

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RICHARD J. ANTON; MORRELL H. BLESH; ARTHUR M. BUECHE; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; JOSEPH H. GAUSS; MARGARET W. GILLESPIE; H.W. GOULDTHORPE; GEORGE L. HALLER; RALPH HART; CHARLES M. HEIDEN; DOROTHY C. HOLT; VICTOR HOLT, JR.; RICHARD M. HURST; P.J. JENSEN; ROBERT B. KEEGAN; MILTON F. KENT; MILLIE B. LASSING; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; FERDINAND F. MCALLISTER; FRANCIS K. MCCUNE; RUSSELL W. MCFALL; JOHN G. MARTIN; H.D. MEADER; BETTY JANE MILLS; DAVID K. MILLS; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; WILLIAM R. SMART; J. STANFORD SMITH; ROBERT P. STRUB; ESTATE OF VERA STRUB; VERNON UNDERWOOD; HOYT AMMIDON,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM D. LEWIS; RICHARD A. GANONG; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; LEWIS & GANONG, a partnership; ROBERT S. TRIPPET; THOMAS A. LANDRITH,

Defendants,

and

E.M. KUNKEL,

Defendant-Appellant.

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**No. 90-5048**

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MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1964 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; THOMAS A. LANDRITH, JR.; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership,

Defendants,

and

E.M. KUNKEL,

Defendant-Appellant.

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**No. 90-5049**

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A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. Burgess, Helen Burgess; DEWY I. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B.

COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARFF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR.; TED B. WESTFALL,

Plaintiffs-Appellees.

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION, a Delaware corporation; ROBERT S. TRIPPET; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM BLUM; THOMAS A. LANDRITH, JR.; MCAFEE, TAFT, MARK, BOND, RUCKS, AND WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; NORMAN C. CROSS, JR.,

Defendants,

and

E.M. KUNKEL,

Defendant-Appellant.

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**No. 90-5051**

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MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; CHARLES M. HEIDEN; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; DOREEN B. HOYT; PETER J. JENSEN; MILTON F. KENT; MILLIE B. LASSING; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; THOMAS A. LANDRITH, JR.; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership,

Defendants.

and

E.M. KUNKEL,

Defendant-Appellant.

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**No. 90-5053**

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A.M. ANDERSON; RICHARD J. ANTON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, E.P. Bernuth, Sophie K. Bernuth, Joseph A. Buda, George

and Helen Burgess; DEWEY CALI; ROBERT B. COBURN; COBURN & LIBBY, INC.; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; MARGARET C. EVERETT; L.L. FERGUSON; ISADOR H. FINKELSTEIN; H.W. GOULDTHORPE; GEORGE L. HALLER; JACK HANSON; RALPH HART; F.H. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; HOWARD G. AND ELIZABETH C. KICHERER, JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; JOHN D. LOCKTON; D.W. AND D.B. LYNCH; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL MCFALL; JAMES F. MADDEN; ALBERT MANGANELLI; NICHOLAS MARCHESE; STANLEY A. MARKS; C.W. MOELLER; WILLIAM H. MORTENSEN; CARL AND PATRICIA OLSON; CARL PALERMO; FRANK PALERMO; ROY T. PARKER; HELEN M. REEDER; D.C. SCARFF; M.L. SCARFF; RICHARD SCOTT; LOUIS P. SINGER; WILLIAM R. SMART; J. STANFORD SMITH; G. CURTIS STEWART; PAUL TOWNSEND; VERNON UNDERWOOD; TED B. WESTFALL; J. HOWARD WOOD; SIDNEY WOOLWICH AND MURRAY ZIMMERMAN,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION, a Delaware corporation; ELMER M. KUNKEL; THOMAS A. LANDRITH; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership; NORMAN C. CROSS, JR.; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5055**

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A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. Burgess, Helen Burgsss; DEWY I. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B. COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARPF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR.; TED B. WESTFALL,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation;

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5056**

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A.M. ANDERSON; BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Merl McHenry, Joseph A. Buda, Arthur Bueche, George V.T. and Helen Burgess; DEWEY J. CALI; WILLIAM H. COLQUHOUN; S.W. CORBIN; ROBERT B. COBURN; VIRGIL B. DAY; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN M. EVANS; MARGARET C. EVERETT; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; RALPH HART; JAMES J. HAYES; EARL D. HILBURN; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; RALPH IANNUCCI; EMILY IANNUCCI; MILTON F. KENT; HOWARD KICHERER; ELIZABETH KICHERER; JOHN B. KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE F. LEVIN; JOHN D. LOCKTON; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; JAMES MADDEN; ALBERT MANGANELLI; NICHOLAS A. MARCHESE; STANLEY A. MARKS; JOHN G. MARTIN; C.W. MOELLER; ANDREW OVERBY; CARL E. PALERMO; FRANK A. PALERMO; ROY T. PARKER, JR.; BRUCE M. ROBERTSON; D.D. SCARFF; M.L. SCARFF; A.E. SCHUBERT; WILLIAM R. SMART; E. STARR; JANET G. STEWART; GERALD TOOMEY; PAUL TOWNSEND; VERNON UNDERWOOD; H.B. WALDRON, JR.; TED B. WESTFALL,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION, a Delaware corporation; HARRY HELLER, SIMPSON THACHER AND BARTLETT, a partnership; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFEE, TAFT, MARK, BOND, RUCKS, AND

WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their successors and assigns; WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr.; NORMAN C. CROSS, JR.,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5057**

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Trustee for Marcella McHenry, Merl McHenry, Fred J. Borch, David Breslauer, Joseph A. Buda; DEWEY CALI; JAMES CLARK; MARY CLARK; WILLIAM H. COLQUHOUN; EDWARD V. COONAN; S.W. CORBIN; WILLIAM H. DENNLER; MARIO DIMARTINO; STELLA DIMARTINO; JOHN EVANS; L.L. FERGUSON; JACK FINE; ISADOR H. FINKELSTEIN; JOSEPH H. GAUSS; H.W. GOULDTHORPE; JAMES J. HAYES; EARL D. HILBURN; DOROTHY C. HOLT; JOSEPH E. HORAK; GERALD A. HOYT; RICHARD M. HURST; JOHN E. HUTCHINSON, III; HAROLD KAPLAN; W.S. JONES; HOWARD G. KICHERER; ELIZABETH KICHERER; JOHN KOKOSZKA; MILLIE B. LASSING; JOSEPH LEVIN; MARIE LEVIN; D.W. LYNCH; D.B. LYNCH; DENNIS G. LYONS; FERDINAND F. MCALLISTER; RUSSELL W. MCFALL; ANTHONY MACAGNA; JAMES F. MADDEN; ALBERT MANGANELLI; NICOLAS A. MARCHESE; CHARLES J. MELOUN; C.W. MOELLER; CARL J. OLSON; PATRICIA OLSON;

THOMAS O. PAINE; CARL E. PALERMO; PRANK A. PALERMO; ROY T. PARKER, JR.; HOWARD RUBENSTEIN; D.D. SCARFF; M.L. SCARFF; C.S. SEMPLE; WILLIAM SMART; J. STANFORD SMITH; JANET G. STEWART; GERALD TOOMEY; OLIVER J. TROSTER; H.B. WALDRON, JR.; HUMBERTO ZAVALETA; MURRAY ZIMMERMAN,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION, a Delaware corporation; HARRY HELLER; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM BLUM; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; MCAFFE, TAFT, MARK, BOND, RUCKS, AMD WOODRUFF, a professional corporation and its professional employees and attorneys and partners, their succsssors and assigns; NORMAN C. CROSS, JR.; WILLIAM D. LEWIS; RICHARD A. GANONG; LEWIS & GANONG, a partnership,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5058**

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RICHARD J. ANTON; MORRELL H. BLESH; ARTHUR M. BUECHE; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; JOSEPH H. GAUSS; MARGARET W. GILLESPIE; H.W. GOULDTHORPE; GEORGE L. HALLER; RALPH HART; CHARLES M. HEIDEN; DOROTHY C. HOLT; VICTOR HOLT, JR.; RICHARD M. HURST; P.J. JENSEN; ROBERT B. KEEGAN; MILTON F. KENT; MILLIE B. LASSING; JOHN D. LOCKTON; D.W. LYNCH;

D.B. LYNCH; FERDINAND F. MCALLISTER; FRANCIS K. MCCUNE; RUSSELL W. MCFALL; JOHN G. MARTIN; H.D. MEADER; BETTY JANE MILLS; DAVID K. MILLS; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; WILLIAM R. SMART; J. STANFORD SMITH; ROBERT P. STRUB; ESTATE OF VERA STRUB; VERNON UNDERWOOD; HOYT AMMIDON,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPAMY; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION,
Defendants,

and

ROBERT S. TRIPPET,
Defendant-Appellant.

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**No. 90-5059**

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RICHARD J. ANTON; MORRELL H. BLESH; ARTHUR M. BUECHE; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; THOMAS S. GATES; JOSEPH H. GAUSS; MARGARET W. GILLESPIE; H.W. GOULDTHORPE; GEORGE L. HALLER; RALPH HOLT; VICTOR HOLT, JR.; RICHARD M. HURST; P.J. JENSEN; ROBERT B. KEEGAN; MILTON F. KENT; MILLIE B. LASSING; JOHN D. LOCKTON; D.W. LYNCH; FERDINAND F. MCALLISTER; FRANCIS K. MCCUNE; RUSSELL W. MCFALL; JOHN G. MARTIN; H.D. MEADER; BETTY JANE MILLS; DAVID K. MILLS; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; WILLIAM R. SMART; J. STANFORD SMITH; ESTATE OF VERA STRUB; VERNON UNDERWOOD; HOYT AMMIDON,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership; WILLIAM D. LEWIS; RICHARD A. GANONG; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; LEWIS & GANONG, a partnership; E.M. KUNKEL; THOMAS A. LANDRITH,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5062**

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MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AND BARTLETT, a partnership,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5063**

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MORRELL H. BLESH; FRED J. BORCH; S.W. CORBIN; VIRGIL B. DAY; WILLIAM H. DENNLER; L.L. FERGUSON; ISADOR H. FINKELSTEIN; GEORGE L. HALLER; RALPH A. HART; F.H. HOLT; D. HOLT; VICTOR HOLT, JR.; GERALD A. HOYT; JOHN D. LOCKTON; D.W. LYNCH; D.B. LYNCH; F.F. MCALLISTER; FRANCIS K. MCCUNE; JOHN G. MARTIN; H.D. MEADER; C.W. MOELLER; WILLIAM H. MORTENSEN; D.D. SCARFF; M.L. SCARFF; J. STANFORD SMITH; C.G. SUITS,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1964 PROGRAM OPERATING CORPORATION, a Delaware corporation; THOMAS A. LANDRITH, JR.; E.M. KUNKEL; HARRY HELLER; WILLIAM BLUM; SIMPSON THACHER AMD BARTLETT,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5064**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5065**

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IVAN A. AMIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE

1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,

Defendants,

and

ROBERT S. TRIPPET,

Defendant-Appellant.

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**No. 90-5066**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LAMDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,

Defendants,

and

FRANK E. SIMS,
Defendant-Appellant.

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**No. 90-5067**

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IVAN A. ANIXTER; BLANCHE DICKENSON; DOLLY K. YOSHIDA, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, an Oklahoma corporation; HOME-STAKE 1971 PROGRAM OPERATING CORPORATION; HOME-STAKE 1970 PROGRAM OPERATING CORPORATION; HOME-STAKE 1969 PROGRAM OPERATING CORPORATION; HOME-STAKE 1968 PROGRAM OPERATING CORPORATION; HOME-STAKE 1967 PROGRAM OPERATING CORPORATION; HOME-STAKE 1966 PROGRAM OPERATING CORPORATION; HOME-STAKE 1965 PROGRAM OPERATING CORPORATION; ROBERT S. TRIPPET; E.M. KUNKEL; THOMAS A. LANDRITH; J.D. METCALFE; H.B. GUTELIUS; H.L. FITZGERALD; NORMAN C. CROSS, JR.,
Defendants,

and

FRANK E. SIMS,
Defendant-Appellant.

UNITED STATES, Intervenor.
SECURITIES AND EXCHANGE COMMISSION,
**Amicus Curiae.**

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**Nos. 90-5040, 90-5041, 90-5042, 90-5043, 90-5044, 90-5045, 90-5046, 90-5047, 90-5048, 90-5049, 90-5051, 90-5053, 90-5055, 90-5056, 90-5057, 90-5058, 90-5059, 90-5062, 90-5063, 90-5064, 90-5065, 90-5066, 90-5067.**

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United States Court of Appeals
Tenth Circuit

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**Filed August 24, 1992.**

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**Appeals from the United States District Court For the Northern District of Oklahoma, D.C. Nos. 73-C-382, 74-C-180, 74-C-229, 74-C-230, 74-C-226, 74-C-224, 74-C-225, 74-C-229, 74-C-228, 74-C-230, 74-C-227, 74-C-225, 73-C-377, 73-C-381**

Walter Steele, Denver, Colorado, and Thomas M. Affeldt, co-counsel, (Jack L. McNulty and C.B. Savage with them on the briefs) of Savage, O'Donnell, Scott, McNulty & Affeldt, Tulsa, Oklahoma, for Defendant-Appellant E.M. Kunkle.

B. Hayden Crawford (Kyle B. Haskins with him on the briefs) of Crawford, Crowe & Bainbridge, P.A., Tulsa, Oklahoma, for Defendants-Appellants Norman C. Cross, Jr.; Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr.; and Cross and Company.

Stan P. Doyle (James C. Thomas with him on the briefs) of Doyle & Harris, Tulsa, Oklahoma, for Appellant-

Defendant Kothe & Eagleton, Inc., a professional corporation.

Peter Van N. Lockwood (Albert G. Lauber and Jill R. Shellow with him on the briefs) of Caplin & Drysdale, Chartered, Washington, D.C., (Elihu Inselbuch of Caplin & Drysdale, New York, New York; William A. Wineberg and Michael R. Simmonds of Broad, Schulz, Larson & Wineberg, San Francisco, California; and William H. Hinkle, Tulsa, Oklahoma, with him on the briefs) for Plaintiffs-Appellees.

Frank E. Sims, Pro Se Defendant-Appellant, Tulsa, Oklahoma, on the brief.

Robert S. Trippet, Pro Se Defendant-Appellant, Tulsa, Oklahoma, on the brief. Timothy E. Flanigan, Acting Assistant Attorney General; Tony M. Graham, United States Attorney; Barbara C. Biddle and Jeffrey K. Shapiro, Department of Justice, Washington, D.C., on the brief for Intervenor United States.

James R. Doty, Jacob H. Stillman, Leslie E. Smith, and Randall W. Quinn, Washington, D.C., on the brief for Amicus Curiae Securities and Exchange Commission.

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Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

MOORE, Circuit Judge.

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In light of the Supreme Court's order remanding this cause, we directed the parties to file supplemental briefs to address the question whether reinstatement of plaintiffs' Section 10(b) claims is now mandated under Section 27A of the Securities and Exchange Act of 1934, § 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991. We specified the parties address *Bank of Denver*

*v. Southeastern Capital Group, Inc.*, 789 F. Supp. 1092 (D. Colo. 1992), and *TGX Corp. v. Simmons*, 786 F. Supp. 587 (E.D. La. 1992), which together held Section 27A unconstitutional as a violation of the separation of powers doctrine. Because of defendants' constitutional challenge, we granted the government's motion to intervene under 28 U.S.C. § 2403. Upon review of the present decisions generated by Section 27A and the briefs, we conclude Congress properly exercised its legislative function to compel a change in the law. We therefore order plaintiffs' Section 10(b) claims reinstated consistent with this opinion.

## I. Prior Proceedings

In *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420 (10th Cir. 1991), we held plaintiffs' claims for violations of §§ 11 and 12 of the Securities Act of 1933 were time-barred under the applicable statute of limitations found in Section 13 of the Securities Act of 1933 and reversed a judgment in their favor awarding over $130 million in damages against the named defendants. Just before our decision, the Supreme Court decided *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991), in which it discarded the traditional practice of applying state limitary periods to § 10b claims and instead extended the uniform federal scheme for express securities actions to these implied actions. The Court applied the rule to the *Lampf* complaint.

If there was any doubt about applying a rule of federal law retroactively after the case announcing the rule did so, the Court attempted to dispel that doubt in *James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S. Ct. 2439, 2447-48 (1991), also decided on June 20, 1991. In that case, joined by five other members of the Court in three concurring opinions, Justice Souter announced, "[o]nce retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law

are not to be switched on and off according to individual hardship. . . ." The sure import of *Lampf* and *Beam* directed our dismissal of plaintiffs' Section 10(b) claims as untimely under a similar analysis to that we had applied to the §§ 11 and 12 claims.

On December 19, 1991, after our decision was entered, Congress proscribed *Lampf*'s retroactive application, inserting an amendment into the FDIC Improvement Act of 1991, Pub. L. No. 102-242, 1991 U.S.C.C.A.N. (105 Stat.) 2236, codified as § 27A of the Securities and Exchange Act of 1934, 15 U.S.C. § 78aa-1 (Supp. III 1991). The new section stated, in part:

> **SPECIAL PROVISION RELATING TO STATUTE OF LIMITATIONS ON PRIVATE CAUSES OF ACTION**
>
> SEC. 27A. (a) EFFECT ON PENDING CAUSES OF ACTION.—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.
>
> (b) EFFECT ON DISMISSED CAUSES OF ACTION.—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—
>
> (1) which was dismissed as time barred subsequent to June 19, 1991, and
>
> (2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

**II. Constitutionality of Section 27A**

We now reconsider plaintiffs' timely motion to reinstate under Section 27A.[1] In support, plaintiffs contend on June 19, 1991, their § 10(b) claims were timely under the applicable Oklahoma two-year limitations period, citing *Hackbart v. Holmes*, 675 F.2d 1114, 1120 (10th Cir. 1982).[2] Based on our prior opinion setting April 30, 1971, as the date on which the discovery period began to run, plaintiffs detail the timeliness of each plaintiff class's filing. Their discussion is predicated on the constitutionality of Section 27A and its directive "including principles of retroactivity" to require application of a pre-*Lampf* state statute of limitations. Defendants contest each position.

To date, two circuits have dealt with Section 27A. *See Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb, Inc.*, ___ F.2d ___, 1992 WL 135101 (2d Cir. June 17, 1992) (§ 27A cannot save plaintiffs' statute of limitations defense raised for first time on appeal); *Grondahl v. Merritt & Harris, Inc.*, 964 F.2d 1290 (2d Cir. 1992) (plaintiff failed to begin action within any of the arguably applicable limitary periods); *Henley v. Slone*, 961 F.2d 23 (2d Cir. 1992) (case remanded for district court to consider timeliness of suit under *Ceres Partners v. GEL Assoc.*, 918 F.2d 349 (2d Cir. 1990), and *Welch v. Cadre Capital*, 923 F.2d 989

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[1] Under Section 27A, to qualify for reinstatement plaintiffs must establish (1) their claims were filed on or before June 19, 1991; (2) at that time, their claims were timely under applicable limitary periods; (3) their claims were dismissed as untimely after June 19, 1991; and (4) their motion to reinstate was filed within 60 days of the enactment of § 27A.

[2] The more direct authority is *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 (10th Cir. 1974) (Oklahoma two-year statute applies which starts to run from the date of actual or constructive discovery of the fraud).

(2d Cir. 1991), *vacated and remanded sub nom. Northwest Sav. Bank v. Welch*, 111 S. Ct. 2882 (1991)); *Pommer v. Medtest Corp.*, 961 F.2d620 (7th Cir. 1992) (case remanded for parties to address application of 27A in light of *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991)). None of these cases addressed the constitutionality of § 27A although numerous district courts have now done so with divergent results. *See, e.g., Rosenthal v. Dean Witter Reynolds, Inc.*, No. 91-F-591, slip op. (D. Colo. June 15, 1992) (Section 27A violates separation of powers); *Bank of Denver v. Southeastern Capital Group, Inc.*, 789 F. Supp. at 1092 (Section 27A unconstitutional); *Johnston v. Cigna Corp.*, No. 90-B-177, slip op. (D. Colo. May 20, 1992); *TGX Corp. v. Simmons*, 786 F. Supp. at 587; *In re Brichard Sec. Litig.*, 788 F. Supp. 1098 (N.D. Cal. 1992); *contra In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, ___ F. Supp. ___, 1992 WL 141946 (D. Ariz. June 16, 1992); *Maio v. Advanced Filtration Sys., Ltd.*, ___ F. Supp. ___, 1992 WL 141859 (E.D. Pa. June 17, 1992); *Brown v. Hutton Group*, ___ F.2d ___, 1992 WL 88375 (S.D.N.Y. Apr. 27, 1992); *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 790 F. Supp. 476, (S.D.N.Y. 1992).

With the proviso that we do not decide constitutional questions unnecessarily, *Jean v. Nelson*, 472 U.S. 846, 854 (1985), the issue has been put in play here both by the facts of the case and "principles of retroactivity" existing on June 19, 1991, in this Circuit.[3] We therefore cannot avoid deciding whether the separation of powers doctrine barred Congress from enacting § 27A.

In their constitutional challenge, defendants rely principally on *United States v. Klein*, 13 Wall. 128, 80 U.S.

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[3] At that time, we applied state limitary periods to § 10b claims. On June 19, 1991, absent *Lampf*, Oklahoma's two-year statute of limitations running from the date of actual or constructive discovery of the fraud and incorporating principles of equitable tolling was applicable.

128, (1871)[4] to urge § 27A violates the doctrines of separation of powers, due process, and equal protection. Central to their analysis is the proposition that § 27A does not change existing law or create new law but specifically commands the courts to decide pending cases in a particular manner and even to direct decisions in cases that have been dismissed. On June 20, 1991, defendants maintain, the *Lampf* interpretation of § 9(e) of the 1934 Securities and Exchange Act was and remained the law for all cases pending or to be filed. Enactment of § 27A did not change § 9(e) but only directed the courts to ignore it for a designated class of cases. Hence, defendants urge Congress overstepped its legislative function to mandate judicial decisions.

However, unlike Section 27A now before us, the enactment at issue in *Klein* ordered: (1) the Court of Claims to find evidence of a Presidential pardon or amnesty inadmissible for claimants seeking redress under the Abandoned and Captured Property Act; (2) the Supreme Court to dismiss for lack of jurisdiction any appeal from a Court

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[4] In *Klein*, 80 U.S. at 128, the administrator of an estate seized during the War between the States, sued in the Court of Claims to recover the proceeds from property sold by government agents. Suit was based on the Abandoned and Captured Property Act of March 3, 1863, 12 Stat. 820, which permitted noncombatant property owners who could prove their loyalty to recover seized property. Later, President Lincoln issued a proclamation granting a full pardon to participants in the rebel cause who affirmed their loyalty, thus conditioning restoration of property rights upon the executive power to pardon. When the Supreme Court decided the Presidential pardon purged the offense and relieved the recipient of any penalties, *United States v. Padelford*, 9 Wall. 531, 76 U.S. 531 (1869), Congress introduced a proviso into the appropriation for the Court of Claims ordering that no pardon was admissible in evidence to support a claim against the United States or establish the right of a claimant to bring suit; or, if already introduced into evidence, to be considered either by the Court of Claims or court on appeal. Indeed, proof of acceptance of the pardon was deemed to be conclusive evidence of the acts pardoned requiring dismissal of the suit.

of Claims judgment based on the claimant's reliance on a pardon; and (3) the Court of Claims was to treat a claimant's receipt of a Presidential pardon as conclusive evidence of disloyalty. The congressional act was, thus, unconstitutional as an effort "to prescribe a rule for the decision of a cause in a particular way." *Klein*, 80 U.S. at 146.

This case is not *Klein*. Section 27A does not direct courts to make specific factual findings or mandate a result in a particular case. *Brown v. Hutton Group*, 1992 WL 88375; *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 790 F. Supp. at 476. It does not remove or alter the courts' constitutional adjudicatory function. Instead, in Section 27A, Congress prescribed a new statute of limitations for the judiciary to apply to all Section 10(b) litigation pending on June 19, 1991. *In re American Continental Corp./Lincoln Sav. & Loan Sec. Litig.*, 1992 WL 141946; *TBG, Inc., v. Bendis*, 1992 WL 80622 (D. Kan. 1992). Surely Congress has the power to change a rule of law and make that change applicable to pending cases. *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801).

Were *Klein* ambiguous in aiding our review, we now have the benefit of the Court's analysis in *Robertson v. Seattle Audubon Soc.*, ___ U.S. ___, 112 S. Ct. 1407, 1413 (1992), to assure our conviction that § 27A "compelle[d] changes in the law, not findings or results under old law." In that case, certain environmental groups challenged the constitutionality of § 318 of the Department of the Interior and Related Agencies Appropriations Act, 1990, 103 Stat. 745, the "Northwest Timber Compromise," enacted in response to ongoing litigation concerning the harvesting and sale of timber from old-growth forests in the Pacific Northwest. The target of the challenge was subsection (b)(6)(A) which declared:

> [T]he Congress hereby determines and directs that management of areas according to subsec-

> tions (b)(3) and (b)(5) of this section . . . known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned Seattle Audubon Society et al., v. F. Dale Robertson, Civil No.89-160 and Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil No. 89-99 (Order granting preliminary injunction) and the case Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil No. 87-1160-FR.

Although the Ninth Circuit held this language rendered the statute unconstitutional because it directed a specific result in two pending cases without repealing or amending existing environmental laws, the Court reversed, concluding the subsection, in fact, changed the law. *Robertson*, 112 S. Ct. at 1413. The Court reasoned the operation of the new subsection "modified the old provisions" and did not "direct any particular findings of fact or applications of law, old or new, to fact." *Id.* The statute did not pass on the "legal or factual adequacy" of administrative documents authorizing timber sales or "instruct courts" how to decide particular timber sales. *Id.*[5]

Similarly, Section 27A does not direct certain factual findings or impose a rule of decision for § 10b claims.[6] It changes the law. *Axel Johnson*, 790 F. Supp. at 476. "Section 27A merely turns back the legal clock to the period

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[5] Given this analysis, that § 318 amended applicable law, the Court declined to consider the application of *Klein* since the Ninth Circuit had stated if the statute changed the law, it would be constitutional.

[6] "Notably absent from § 27A, unlike the statute held unconstitutional in *Klein*, is a specific directive as to what evidence a court may consider in determining the timeliness of the suit's filing or the case's merits." *Axel Johnson, Inc. v. Arthur Andersen & Co.*, 790 F. Supp. 476, 479 (S.D.N.Y. 1992); *see also Adler v. Berg Harmon Assocs.*, 790 F. Supp. 1235 (S.D.N.Y. 1992).

just prior to *Lampf* and then permits courts independently to adjudicate any reopened actions on the basis of the law as they determine it then existed." *Adler v. Berg Harmon Assocs.*, 790 F. Supp. 1235, 1243 (S.D.N.Y. 1992).

Indeed, Section 27A changes the law and was intended to change the law.[7] Before its enactment, all § 10(b) claims were governed by the one-year/three-year *Lampf* statute of limitations as applied retroactively by *Beam*. "Section 27A changed the law by limiting the one-year/three-year rule to prospective application only and by subjecting Section 10(b) claims filed prior to June 19, 1991 to the limitations period determined to be applicable by the court in which the action was filed." *Berg Harmon*, 790 F. Supp. at 1243.[8]

In enacting Section 27A, Congress exercised a key legislative power. Statutes of limitations traditionally reside

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[7] Plaintiffs cite extensive legislative history incorporating SEC concerns and news articles decrying *Lampf*'s shortening of the statute of limitations and its unfair retroactive application. *See, e.g.*, Barbara Roper, *Stop the Clock on Swindlers*, N.Y. Times, Nov. 19, 1991. During the Senate debate Senator Richard Bryan stated:

> Lampf changed the rules in the middle of the game for thousands of fraud victims who already had suits pending—applying a shorter statute of limitation than when they brought their suits.
>
> . . . .
>
> In effect, this provision in S. 543 overrules the retroactive effect of Lampf and applies the law as it would have been applied in particular circuits the day before the Lampf decision was decided. That would of course include interpretative principles such as retroactivity and equitable tolling.

137 Cong. Rec. 18624 (daily ed. November 27, 1991).

[8] In *Bankard v. First Carolina Communications, Inc.*, 1992 WL 3694, *6 (N.D. Ill. Jan. 6, 1992), the district court noted, "Congress has changed the law. It might seem otherwise only because instead of delineating fully the change of law, Congress has made the change by reference, incorporating the prevailing law in the applicable jurisdiction."

in the legislative branch. "They have come into law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right . . . ." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). In this sense, our case more closely resembles *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), in which the Court affirmed Congress' power to enact legislation waiving the res judicata defense of a prior judgment. "Legislation to alter such a technical defense, and its application even to dismissed cases, goes far less to the heart of the judicial function than would a legislative attempt to reverse adjudications which had addressed the true merits of the disputes in question." *Axel Johnson*, 790 F.2d at 483.

It is this peculiar realm of legislative prerogative which nullifies defendants' additional contentions of denial of due process and equal protection, propped on the belief our prior dismissal gave them a vested right in a judgment that Congress cannot now annul. The constitutional test was stated in *Chase Securities*:

> The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking life, liberty or property without due process of law. . . . Assuming that statutes of limitation, like other types of legislation, could be so manipulated that their retroactive effects would offend the Constitution, certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is *per se* an offense against the Fourteenth Amendment.

325 U.S. at 315-16 (quoted in *International Union of Elec. Wkrs., AFL CIO, Local 790 v. Robbins & Myers*, 429 U.S. 229, 243-44 (1976)). In 27A, Congress evinced a legitimate

purpose to protect the reasonable expectations of litigants who relied on established law in filing § 10(b) actions. Section 27A is rationally related to that legislative purpose.[9]

Finally, contrary to defendants' assertions, *Beam* was carefully crafted to garner a plurality to agree only that retroactive application of a rule of law announced in a case was a matter of a choice of law and not of constitutional import. *Beam* did not declare unconstitutional the practice of selective prospectivity as evidenced by Justice White's concurring opinion.[10]

Consequently, we hold § 27A constitutional. Plaintiffs timely moved to reinstate their claims under § 27A(b). We therefore reinstate the verdict with regard to the relief awarded for violations of § 10(b) and Rule 10b-5.

### III. Pretrial Ruling

With the resuscitation of plaintiffs' § 10(b) claims, an issue left unaddressed by our prior disposition under *Lampf* is resurrected. That issue, raised by defendants Kothe and Eagleton, Inc., (K & E) and E.M. Kunkel (Kunkel), asks

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[9] We reject defendants' equal protection argument that it is irrational for Congress to permit courts to treat people in one state differently from those in another with respect to a statute of limitations defense. As we have noted in the first instance, limitary defenses are a matter of legislative grace. Defendants make too much of this technical defense. Similarly, defendants' urging § 9(e) is a preemptive statute of limitations is irrelevant to the analysis of the constitutionality of Section 27A.

[10] Justice Souter stated:

> The grounds for our decision today are narrow. They are confined entirely to an issue of choice of law: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity.

111 S. Ct. at 2448.

whether the district court committed reversible error in reinstating § 10(b) and Rule 10b-5 claims against these two defendants. In a pretrial order, the district court had granted partial summary judgment for K & E and Kunkel on these claims. Seventeen days into the trial, close to the end of the plaintiffs' presentation of evidence, the district court reinstated the claims (R. V. 25, at 3874) without explanation or contemporaneous objection from K & E or Kunkel. The following day, however, the district court denied respective motions for a mistrial, rejecting without comment defendants' assertions of prejudice which, they claimed, could not be overcome at that stage in the trial.

On appeal, K & E and Kunkel press this contention, urging they proceeded to trial relying on the pretrial order designating only the Section 11 claim against them. Plaintiffs reply defendants were at all times aware of the factual allegations they intended to prove at trial, many of which implicated the elements of proof of a § 10(b) claim. Although K & E and Kunkel allege reinstatement caused them prejudice, plaintiffs maintain defendants failed to specify any witnesses who would have been recalled or were not fully cross-examined to substantiate their claim.

The answer to defendants' contention lies somewhere in the interstices of Fed. R. Civ. P. 54(b),[11]

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[11] Fed. R. Civ. P. 54(b) states:

> **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and

56(d),[12] and 16(e),[13] dgments, summary judgments, and pretrial orders. Under Rule 56(d), summary adjudication of only some of the claims imposes a duty on the trial court to "if practicable" articulate what facts are established and which remain controverted. The final sentence of Rule 56(d) states: "Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly." In our case, the district court offered no explanation of the basis for granting partial summary judgment. Within the elaborate factual scenario plaintiffs set forth to establish their claims of securities

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liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

[12] Fed. R. Civ. P. 56(d) states:

> **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

[13] Fed. R. Civ. P. 16(e) states:

> **Pretrial Orders.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

fraud, we can only speculate about the alleged lack of proof on which the district court relied.

Nevertheless, the district court's order granting partial summary judgment for K & E and Kunkel on the § 10(b) claims is not a final judgment under Fed. R. Civ. P. 54(b). Under Rule 54(b), this order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Unless the district court makes the "express determination" under Rule 54(b) that "there is no just reason for delay" and the "express direction for the entry of judgment," partial summary judgment of fewer than all of the claims or parties "shall not terminate the action as to any of the claims or parties" and may be revised at any time before final judgment is entered on all of the claims and parties.

> It follows . . . that if the order which the court makes under Rule 56(d) is not a final judgment, but is an interlocutory order, the concluding sentence of Rule 56(d) would not prevent the trial court from altering its order as to what facts are established. Unless good cause is shown the court should not, of course, do so; but it surely has power to revise an interlocutory order that specifies which facts are established and which facts remain for trial.

6 J. Moore, W. Taggart, & J. Wicker, *Moore's Federal Practice* ¶ 56.20[3.-4], at 56-707 (2d ed. 1992). A component of this power is Rule 16(e) which permits modification of the pretrial order "only to prevent manifest injustice."

Within the interplay of these rules, we must properly acknowledge the role of the trial judge, which is broadly circumscribed by the discretion to conduct the trial proceedings consistent with what plays out before the court, not inflexibly constrained by pretrial rulings which may not be borne out by the trial process. In certain circumstances, premature granting of a motion for partial summary judg-

ment should not force the district court to pre-try the action. *Moore's Federal Practice* ¶ 56.02[5], at 56-37. As the court noted in *Audi Vision Inc. v. RCA Mfg. Co.*, 136 F.2d 621, 625 (2d Cir. 1943):

> It should be clearly recognized that orders of the district court of the type entered in this action below [partial summary judgment] are in essence only pre-trial orders, as explicitly provided for in Rule 16 and again in the summary judgment rule, Rule 56(d), when a complete summary judgment is not granted. But such an order is expressly subject to modification "at the trial to prevent manifest injustice." If the district court will take care in cases such as this to make it clear that its order is of the pre-trial type as authorized under these rules, the parties will then more fully recognize their rights and the court will have retained full power, as it should, to make one complete adjudication on all aspects of the case when the proper time arrives.

Under this analysis, we therefore hold the district court did not abuse its discretion in reinstating these claims. Under the circumstances of this case, the court's pretrial order was not final and hence subject to revision at any time.

Our holding the district court did not abuse its discretion in reinstating the § 10(b) and Rule 10b-5 claims against K & E and Kunkel is sobered by the voluminous record in this appeal. The multiple classes and numerous defendants involved in this multidistrict litigation consuming more than a decade spawned a hydra for the presiding trial judge. That the trial court chose to revise its prior order upon hearing the bulk of plaintiffs' evidence cannot now be second-guessed. Although we do not agree with plaintiffs' cavalier homogenization of Section 11 and Section 10(b) claims, we do not believe, under all of the facts and circumstances detailed in the record before us, that

K & E and Kunkel have substantiated their claim of prejudice. Because of that circumstance, we hold the district court did not abuse its discretion in reinstating these claims. The judgment of the district court, therefore, is **AFFIRMED** in part and **REVERSED** in part.

## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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**Nos. 90-5040 - 90-5049, 90-5051, 90-5053, 90-5055 - 90-5059, 90-5062 - 90-5067**

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IVAN A. ANIXTER, et al.,
Plaintiffs - Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, et al.,
Defendants,

and

ROBERT S. TRIPPETT, et al.,
Defendants - Appellants,

and

UNITED STATES OF AMERICA, et al.,
Intervenors.

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**ORDER**
**Entered September 10, 1992**

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**Before MOORE, ANDERSON and BRORBY, Circuit Judges.**

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This matter comes on for consideration of appellant Robert Trippett's petition for rehearing filed in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

By: /s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

## APPENDIX E

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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**Nos. 90-5040 - 90-5049, 90-5051, 90-5053, 90-5055 - 90-5059, 90-5062 - 90-5067**

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IVAN A. ANIXTER, et al.,
Plaintiffs/Appellees,

v.

HOME-STAKE PRODUCTION COMPANY, et al.,
Defendants,

and

WYNEMA ANNA CROSS, Executrix of the Estate of Norman C. Cross, Jr., et al.,
Defendants/Appellants.

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**No. 90-5045**

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IVAN A. ANIXTER, et al.,
Plaintiffs/Appellees,

v.

HOME-STAKE PRODUCTIONS COMPANY, et al.,
Defendants,

and

KOTHE & EAGLETON, INC.,
Defendant/Appellant.

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## ORDER ON PETITIONS FOR REHEARING

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

MOORE, Circuit Judge.

Upon our order reviving plaintiffs' claims under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, based on § 27A of the Securities Exchange Act of 1934, § 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, and rejecting certain defendants' contention the district court erred by reinstating the § 10(b) claims against them during trial, *Anixter v. Home-Stake Prod. Co.*, ___ F.2d ___, 1992 WL 201143 (Aug. 24, 1992) (*Anixter II*), defendants Kothe & Eagleton, Inc. (K & E); Wynema Anna Cross, Executrix of the Estate of Norman C. Cross, Jr., and Cross & Company (Cross); and E. M. Kunkel (Kunkel) have filed three separate petitions for rehearing. We deny the petitions in part and grant in part to remand on the issues of the statute of limitations and prejudgment interest with the following amplifications.

In its separate petition, K & E urges the 1971 Class plaintiffs' § 10(b) action is time-barred under the applicable Oklahoma statute of limitations to which we must look under § 27A. Given our selection of April 30, 1971, as the time from which notice was triggered, or the date of purchase if purchased after the discovery date, *Anixter v. Home-Stake Prod. Co.*, 939 F.2d 1420, 1440 (10th Cir. 1991) (*Anixter I*), K & E argues because the last date of sale for the 1971 Program was December 31, 1971, the last date for filing could be no later than December 31, 1973. K & E contends, therefore, plaintiffs' May 24, 1974, suit was untimely and should be dismissed even under § 27A.

Although we look to federal law to determine when the statute of limitations begins to run, state law governs the length of that limitary period. *Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1412 (9th Cir. 1987) (citation omitted). In this case, as previously noted, Oklahoma law sets the applicable limitary period to file an action for fraud as two years from the date of discovery, Okla. Stat. Ann. tit. 12, § 95, to run "from the date of actual or constructive discovery of the fraud." *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171 (10th Cir. 1974). "The crucial issue of fact with respect to the commencement of the running of the applicable two-year statute of limitations is when the plaintiff actually knew, or in the exercise of reasonable diligence should have known, of the existence of the alleged fraudulent . . . activity on the part of the defendants." *Id.* at 171-72.

Moreover, because § 27A reinstates a statute of limitations for actions under § 10(b) commenced on or before June 19, 1991, and rejects the imposition of a statute of repose as found in § 13 of the Securities Act of 1933, 15 U.S.C. § 77m, and announced in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991), principles of equitable tolling enunicated throughout federal law, *see Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874), and *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), and mirrored in Oklahoma law, *see, e.g., Dearing v. State ex rel. Comm'rs of Land Office*, 808 P.2d 661 (Okla. 1991), may also be read into the two-year period. *State of Ohio v. Peterson, Lowry, Rall*, 651 F.2d 687, 691 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981). Federal law determines what circumstances will toll a state statute of limitations applied to private actions under § 10(b). *Esplin v. Hirschi*, 402 F.2d 94, 103 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

Albeit our selection of April 30, 1971, as the date from which plaintiffs' were placed on notice of the alleged fraud-

ulent acts, the jury answered special interrogatories[1] finding the 1971 Class plaintiffs in the exercise of reasonable diligence could not have discovered K & E's involvement in the alleged fraud until September 1973, the time when Home-Stake declared bankruptcy. Given the many theories of fraudulent concealment presented to the jury and the court's instructing the jury on equitable estoppel, we cannot say with certainty whether the jury's factual finding on the statute of limitations implicitly incorporated a finding the statute was equitably tolled. Moreover, because K & E was not named in the 1971 SEC suit, the jury may well have considered equitable tolling in arriving at the later September 1973 date.

We recognize in securities fraud cases the cause of action may accrue at a separate and distinct time from when the plaintiff/investor is injured. That is, a material misrepresentation may far precede plaintiff's injury. Nevertheless, an aggrieved investor must bring an action once he discovers or should have discovered the fraud. "The purpose of the Securities Exchange Act is to protect the innocent investor, not one who loses his innocence and then waits to see how his investment turns out before he decides to invoke the provisions of the Act." *Volk*, 816 F.2d at 1413 (citation omitted) (quoting *Royal Air Properties, Inc. v. Smith*, 312 F.2d 210, 213-14 (9th Cir. 1962). Indeed, in *Anixter I*, we noted the various investment and tax concerns that individual investors, later class representatives, considered upon learning of the rescission offer.

We must, therefore, remand this action for the trial court to determine whether the contested § 10(b) class action was timely filed based on these considerations and the standards we announced in *Anixter I*. The district court is in a better position to make those findings in

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[1] The jury returned special interrogatories on the statute of limitations for each of the plaintiff classes.

accordance with this order and other relevant factors we have set forth.

Notwithstanding this disposition, we reject K & E's contention its activity did not amount to proof of scienter under § 10(b) and Rule 10b-5. Evidence was introduced in support of plaintiffs' claims K & E was primarily and secondarily liable under Rule 10b-5, and the jury was instructed without objection on each of the elements necessary to find liability. Moreover, we have held proof of recklessness satisfies the requirement for scienter, not only aligning ourselves with other Circuits but also fulfilling the principle, "the Securities Acts are to be broadly construed to achieve their remedial goals." *Hackbart v. Holmes*, 675 F.2d 1114, 1117 (10th Cir. 1982) (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972)). Again, the jury placed its stamp on the evidence related to the actions of David James and John Eagleton, K & E attorneys who participated in the 1971 Home-Stake offering. K & E's version of this evidence cannot now displace the verdict.

Cross seeks rehearing to dismiss the tag-along judgment in an appended non-class action, *Anderson v. Home-Stake Prod. Co.*, 74-C-180, which involved claims of 1969 and 1970 individual investors.[2] The individual 1969 and 1970 § 10(b) actions were not filed until April 25, 1974. In contrast, the 1965 through 1971 Class representatives filed suit against Cross on March 30, 1973, just within two years of April 30, 1971. As already noted, the jury made factual findings on each plaintiff class,[3] but no such special in-

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[2] We do not find this precise issue raised before; nevertheless, we proceed to dispose of it.

[3] The special interrogatory stated:

> Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should

terrogatory was returned for these particular claims. This gap is not filled by the court's October 17, 1988, order summarily concluding these claims were timely. Extrapolating from all of these facts and adhering to our prior determination setting April 30, 1971, as the date on which the discovery period began, we, therefore, conclude the individual *Anderson* 1969 and 1970 claims which were not filed until April 25, 1974, must be dismissed. Section 27A would not revive those claims.

The remainder of the contentions raised by Cross in their petition for rehearing are without merit. We cannot say the district court abused its discretion in its evidentiary rulings[4] or that the court's active participation in the trial amounted to a denial of Cross' constitutional right to due process and a fair and impartial trial. As Judge Breitenstein of venerable memory once observed, "Ever increasing litigation places intolerable burdens on federal judges with resulting irritation and impatience. Heavy as they are, the judiciary must bear these burdens." *Lane v. Wallace*, 579 F.2d 1200, 1203 (10th Cir. 1978). However, reviewing this record as a whole, as did the *Lane* court, and "guard[ing] against the magnification on appeal of instances which were of little importance in their setting,"

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have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

[4] Specifically, Cross contends the court committed reversible error in preventing three I.R.S. agents from testifying as fact witnesses about accounting methods, the question of oversales of programs, and the treatment of "pro rev" in the I.R.S. audit. The court sustained objections, finding the case was not centrally a tax case, the witnesses could not be qualified as expert auditors, and could not properly testify on Mr. Cross' state of mind. The district court also excluded testimony from Mark Van Loucks, who was proffered by Cross as a potential investor to explain his understanding of Home-Stake's annual reports. The court sustained the objection to that testimony under Fed. R. Evid. 701.

*id.* at 1204 (citation omitted), we are satisfied Cross received a fair trial. While it bears remembering "[p]atience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well tuned cymbal," Francis Bacon, *Essays*, pub. by J.M. Dent & Sons, 1958, Essays LVI, pp. 162, 163, cited in *Lane*, the district court's interjecting itself into the questioning of witnesses and occasional outbursts of pique did not affect Cross' substantial rights. Though not a perfect trial, Cross received a fair trial under all of the circumstances.

The joint petition for rehearing filed by K & E, Cross, and Kunkel states our prior decisions overlooked causation issues, the district court's improper calculation of damages and disregard of settlement benefits already received, the unfair and excessive award of prejudgment interest and entitlement to postjudgment interest, and certain unresolved errors that would compel granting a new trial on the § 10(b) and Rule 10B-5 claims. In our effort to bring finality to this action, the prior opinions were limited to the dispositive resolutions and did not reflect our review of the considerable record. Upon our refreshing that review, we remain convinced the issues raised on causation and the motion for new trial are without merit. During trial, defendants could not overcome plaintiffs' substantial evidence supporting their claims under § 10(b) and Rule 10b-5. Defendants' recharacterization of that evidence again is defied by the record.

Certain of the numerous issues related to the calculation and award of damages under § 10(b), however, merit some discussion. The jury was instructed, "As a general matter plaintiffs' damages will be the amount they paid for their Home-Stake units minus any distributions made to them by Home-Stake prior to its filing for reorganization and minus the value, if any, of their Home-Stake units on various dates set by law." Tr. at 4843, May 19, 1989. The jury returned verdicts setting the value of each program interest for purposes of calculating plaintiffs' damages.

Although a rescissory measure of damages may be available in certain cases under § 10(b), *Randall v. Loftsgaarden*, 478 U.S. 647, 661-62 (1986), the more typical remedy generally limits the plaintiff's recovery to out-of-pocket losses or actual damages. § 28(a) of the Securities Exchange Act of 1934; 15 U.S.C. § 78bb(a); *Feldman v. Pioneer Petroleum, Inc.*, 813 F.2d 296, 301 (10th Cir.), *cert. denied*, 484 U.S. 954 (1987). That is, "the correct measure of damages under § 28 of the Act, 15 U.S.C. § 78bb(a), is the difference between the fair value of all that the [plaintiff] received and the fair value of what he would have received had there been no fraudulent conduct." *Randall*, 478 U.S. at 661-62 (quoting *Affiliated Ute Citizens*, 406 U.S. at 155).

The final judgments entered by the district court reflected this out-of-pocket measure of damages, less various sums related to prior distributions and settlements. The district court refused to offset the amounts received in tax benefits against the § 10(b) judgments. Joint defendants continue to press this alleged error.

Although the *Randall* Court left open this precise question,[5] and focussed its discussion solely on whether tax benefits may reduce a rescissory measure of damages under § 12(a) of the Securities Act of 1933 and § 10(b), not present in our case, we find no guidance in existing case law under *Randall* to warrant a different treatment here.[6] We hold, therefore, the district court did not err in dis-

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[5] In his concurring opinion, J. Blackmun observed, "The Court recognizes that it may be proper to reduce recovery in cases brought solely under § 10(b) and involving securities as to which tax consequences provided a major inducement to investment, and I therefore join its opinion." 478 U.S. at 670.

[6] Before *Randall*, the issue was analyzed by utilizing the collateral source rule, now displaced by *Randall*. *See, e.g., William Z. Salcer, Panfeld, Edelman v. Envicon Equities Corp.*, 744 F.2d 935, 941 (2d Cir. 1984), *cert. granted & judgment vacated by*, 478 U.S. 1015 (1986).

allowing a reduction in plaintiffs' recovery based on the tax benefits received.

Our review produces a different result on the continuing objection to prejudgment interest awarded. Although the district court held as a matter of law prejudgment interest was available, we cannot discern the analysis it employed, if any, to arrive at that result.

We have stated under federal law prejudgment interest is generally available "to compensate the wronged party for being deprived of the monetary value of his loss from the time of the loss to the payment of judgment." *U.S. Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1256 (10th Cir. 1988). Despite the general availability of prejudgment interest absent some justification for withholding it, federal law does not make it available as a matter of right. Factored into these general compensatory principles are "fundamental considerations of fairness." *Id.* (citation omitted).

We have thus applied a two-step analysis to decide whether prejudgment interest should be awarded. "First, the trial court must determine whether an award of prejudgment interest would serve to compensate the injured party. Second, when an award would serve a compensatory function, the court must still determine whether the equities would preclude the award of prejudgment interest." *Id.* at 1257. Added to this analysis are the special concerns in securities fraud cases where a defendant's behavior has involved dishonest or fraudulent conduct. Recognizing this special consideration in such cases permits prejudgment interest to be awarded as part of compensatory damages, *Rolf v. Blyth, Eastman Dillon & Co.*, 637 F.2d 77 (2d Cir. 1980); however, prejudgment interest is not mandatory. *Manufacturers Hanover Trust Co. v. Drysdale Securities Corp.*, 801 F.2d 13, 28 (2d Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987).

The record before us does not disclose this two-step analysis underpinning the district court's award of prejudgment interest.[7] This is particularly troubling given the approximately fifteen-year gap between the filing of the complaints in 1973 and trial of the action in 1988. Moreover, given the disparity between the award of prejudgment interest and the damages,[8] we believe these findings are essential to dispel the contention the award was, in fact, punitive. In this reexamination, however, we reject joint defendant's contention their liability for prejudgment interest, if awarded, does not arise until August 24, 1992, the date on which we reinstated the § 10(b) judgment. Despite the on-again-off-again history of this claim, prejudgment interest accrued until the time judgment was entered and remains fixed at that date. *West Virginia v. United States*, 479 U.S. 305 (1987).

Finally, joint defendants assert the reinstatement of the November 16, 1989, judgments resurrects a similar question on postjudgment interest. Defendants urge we find postjudgment interest does not begin to run until August 24, 1992, the date we reinstated the § 10(b) claims.

However, postjudgment interest is a creature of statute.[9] Under 28 U.S.C. § 1961, "[i]nterest shall be calculated from

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[7] This absence in the record cannot be explained and overlooked under Fed. R. Civ. P. 52(a) as plaintiffs contend.

[8] For example, the 1967 Class which had a gross investment of $6,669,950 was awarded $1,236,629.11 in damages and $9,787,602.62 in prejudgment interest.

[9] 28 U.S.C. § 1961 provides:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

the date of the entry of the judgment." Although there is precedent in this Circuit to award postjudgment interest from the date judgment was entered on remand, *Ashland Oil Inc. v. Phillips Petroleum Co.*, 607 F.2d 335, 336 (10th Cir. 1979) (per curiam), *cert. denied*, 446 U.S. 936 (1980), the court did so because of "the extent to which the case was reversed, 'the judgment' for the purpose of interest was that entered by the trial court on remand." We think, however, this case is closer to *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737 (10th Cir. 1987), *cert. dismissed*, 486 U.S. 1063 (1988), in which the court held the prior reversal only involved questions of valuation, not liability itself. We, therefore, have no basis here to entertain defendants' contrary contention.

Finding no merit in the assertions of error in the district court's refusal to disallow other deductions for trustee distributions, attorney fees, and additional anticipated recoveries, we partially GRANT rehearing, and on rehearing and redetermination REMAND this action for findings on the statute of limitations and prejudgment interest consistent with this order. We REVERSE the judgment on the individual *Anderson* 1969 and 1970 complaints and ORDER their dismissal. Rehearing is otherwise DENIED, and the judgment of the district court is AFFIRMED.

## APPENDIX F

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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**M.D.L. 153**
**ALL CASES**

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In Re:

HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION

### ORDER

The Court having received the jury's verdicts and answers to special interrogatories on statutes of limitations and equitable estoppel on September 2, 1988, and having reviewed and considered the parties' previously filed briefs and arguments with respect to the statute of limitations issues under (i) section 11 of the Securities Act of 1933 (the "1933 Act"), (ii) section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), and Rule 10b-5 thereunder, and (iii) common law negligence, hereby finds and orders:

(1) Based on the jury's findings that the class representatives for the 1964 through 1972 classes, both individually and in their representative capacity, did not discover nor should have discovered by the exercise of reasonable diligence until September, 1973, that defendants Robert S. Trippet, Frank E. Sims, Elmer M. Kunkel, Cross & Company, Norman C. Cross, Jr. and Kothe & Eagleton, Inc. violated or aided and abetted a violation of Rule 10b-5, the claims asserted under section 10(b) of the 1934 Act and Rule 10b-5 thereunder against those defendants by the nine class representatives, both on behalf of them-

selves and the classes they represent, are not time-barred by the applicable statutes of limitation.

(2) Based on the jury's findings that the class representatives for the 1964 through 1972 classes, both individually and in their representative capacity, did not discover nor should have discovered by the exercise of reasonable diligence until September, 1973, that with respect to the claims against defendants Robert S. Trippet, Frank E. Sims, Cross & Company, Norman C. Cross, Jr., Kothe & Eagleton, Inc. and Elmer M. Kunkel under section 11 of the 1933 Act, any part of the registration statements for the 1964 through 1972 Programs, including specifically those parts prepared or certified by defendants, Cross & Company, Norman C. Cross, Jr., Kothe & Eagleton, Inc. and Elmer M. Kunkel, misstated or omitted material facts in violation of section 11, the claims asserted under section 11 of the 1933 Act against those defendants by the nine class representatives, both on behalf of themselves and the classes they represent, are not time-barred under section 13 of the 1933 Act because of defendants' fraudulent concealment of plaintiffs' causes of action and the doctrine of equitable tolling.

(3) Based on the jury verdicts (i) against defendants Kunkel and Cross with respect to negligence claims asserted against them in the individual actions, Case Nos. 74-C-224, 74-C-225, 74-C-226, 74-C-229, 74-C-180, 74-C-230, and (ii) on the section 11 and the Rule 10b-5 claims asserted in those cases and Case Nos. 74-C-227 and 74-C-228 against defendants Trippet, Cross and Kunkel, in light of the Court's instructions, such claims are not time-barred by the applicable statutes of limitations.

(4) Alternatively, based both on the jury's findings that defendants Trippet and Kunkel, assisted by other officers of Home-Stake Production Company, intentionally thwarted and defeated the federal courts, the SEC and the IRS in their efforts to administer and enforce the laws of the

United States in connection with the offering and sale of Home-Stake programs and on the Court's own hearing and evaluation of the evidence on that subject, including the assistance in that course of conduct rendered by Cross & Company, Norman C. Cross, Jr., Elmer M. Kunkel (as Home-Stake's outside auditor), and Kothe and Eagleton, Inc. by their participation in the preparation and certification of financial statements or legal opinions contained in and the drafting of the registration statements for the various programs, defendants are estopped from raising statute of limitations defenses to the claims asserted against them under section 11 of the 1933 Act, section 10(b) of the 1934 Act and Rule 10b-5 thereunder and common law negligence.

/s/ _____
Manuel L. Real, Chief Judge
United States District Court
Central District of California

## APPENDIX G

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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**M.D.L. 153**

**73-C-382 and 73-C-377**
**(Consolidated)**

**74-C-180, 74-C-224, 74-C-225, 74-C-226, 74-C-227, 74-C-229 and 74-C-230**

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In Re:

HOME-STAKE PRODUCTION COMPANY SECURITIES LITIGATION

### FINAL JUDGMENT

Based on the jury's verdicts dated September 2, 1988, and May 19, 1989, and the Court's Order on Motion For Partial Summary Judgment on Damages (filed March 15, 1989), as amended by the Order of March 31, 1989 (filed May 4, 1989), and further based on Plaintiffs' Motion For Entry of Judgments Pursuant to Rules 56 and 58, filed June 28, 1989, the briefs and arguments of the parties with respect thereto, and the Court's rulings in open court on November 9, 1989, with respect to the allowance of prejudgment interest,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the members of the nine program classes in the *Anixter* action shall recover from the defendants listed below the following aggregate amounts (including, in the exercise of the Court's discretion, prejudgment interest in the amounts set forth below) on the following claims. The share of each *Anixter* class member in the judgments set out below shall be as set forth in the applicable schedules attached to this judgment.

*Anixter, et al. v. Home-Stake Production Co., et al., Case Nos. 73-C-382 and 73-C-377 (Consolidated).*

| Defendant(s) Liable | Program (No. of Units) | Claim | Amount |
|---|---|---|---|
| Robert S. Trippet<br>Elmer M. Kunkel | 1964<br>(248.52 Units) | Section 11[1] | $2,197,177.13 |
| | | Prejudgment interest | $6,923,411.28 plus $656.91 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Frank E. Sims | 1964<br>(248.52 Units) | Rule 10b-5[2] | $2,246,836.12 |
| | | Prejudgment interest | $7,010,925.53 plus $671.76 per day from July 1, 1989 through the date of entry of this judgment |

[1] Reference is to section 11 of the Securities Act of 1933, 15 U.S.C. § 77k.

[2] Reference is to section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

| | | | |
|---|---|---|---|
| Robert S. Trippet<br>Elmer M. Kunkel | 1965<br>(274.31 Units) | Section 11 | $2,268,825.73 |
| | | Prejudgment interest | $8,408,139.86 plus $678.34 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Frank E. Sims | 1965<br>(274.31 Units) | Rule 10b-5 | $2,268,825.73 |
| | | Prejudgment interest | $8,408,139.86 plus $678.34 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Elmer M. Kunkel | 1966<br>(321.1 Units) | Section 11 | $2,884,880.32 |
| | | Prejudgment interest | $9,877,418.20 plus $862.44 per day from July 1, 1989 through the date of entry of this judgment |

| | | | |
|---|---|---|---|
| Robert S. Trippet<br>Frank E. Sims | 1966<br>(321.1 Units) | Rule 10b-5 | $2,884,880.32 |
| | | Prejudgment interest | $9,877,418.20 plus $862.44 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet | 1967<br>(351.05 Units) | Section 11 | $1,236,629.11 |
| | | Prejudgment interest | $9,736,200.42 plus $369.80 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Frank E. Sims | 1967<br>(351.05 Units) | Rule 10b-5 | $1,236,629.11 |
| | | Prejudgment interest | $9,736,200.42 plus $369.80 per day from July 1, 1989 through the date of entry of this judgment |

| | | | |
|---|---|---|---|
| Robert S. Trippet | 1968<br>(541.71 Units) | Section 11 | $4,704,418.52 |
| | | Prejudgment interest | $15,126,916.07 plus $1,406.50 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Frank E. Sims | 1968<br>(541.71 Units) | Rule 10b-5 | $4,704,418.52 |
| | | Prejudgment interest | $15,126,916.07 plus $1,406.50 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Elmer M. Kunkel<br>Wynema Anna Cross as Executrix of the Estate of Norman C. Cross, Jr. (hereinafter referred to as "Estate of Cross") | 1969<br>(628.77 Units) | Section 11 | $6,014,978.10 |
| | | Prejudgment interest | $18,729,195.57 plus $1,798.70 per day from July 1, 1989 through the date of entry of this judgment |

| | | | |
|---|---|---|---|
| Robert S. Trippet<br>Frank E. Sims<br>Elmer M. Kunkel<br>Estate of Cross | 1969<br>(628.77 Units) | Rule 10b-5 | $6,014,978.10 |
| | | Prejudgment interest | $18,729,195.57 plus $1,798.70 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Elmer M. Kunkel<br>Estate of Cross | 1970<br>(655.84 Units) | Section 11 | $4,727,067.19 |
| | | Prejudgment interest | $17,496,406.26 plus $1,413.27 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Frank E. Sims<br>Elmer M. Kunkel<br>Estate of Cross | 1970<br>(655.84 Units) | Rule 10b-5 | $4,804,705.27 |
| | | Prejudgment interest | $17,612,793.06 plus $1,436.51 per day from July 1, 1989 through the date of entry of this judgment |

| | | | |
|---|---|---|---|
| Robert S. Trippet<br>Estate of Cross | 1971<br>(457.33 Units) | Section 11 | $2,592,422.68 |
| | | Prejudgment interest | $10,804,882.97 plus $775.07 per day from July 1, 1989 through the date of entry of this judgment |
| Kothe & Eagleton, Inc. | 1971<br>(457.33 Units) | Section 11 | $3,223,801.83 |
| | | Prejudgment interest | $11,826,217.90 plus $963.84 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Frank E. Sims<br>Estate of Cross<br>Kothe & Eagleton, Inc. | 1971<br>(457.33 Units) | Rule 10b-5 | $2,481,302.14 |
| | | Prejudgment interest | $10,660,525.65 plus $741.66 per day from July 1, 1989 through the date of entry of this judgment |

| | | | |
|---|---|---|---|
| Robert S. Trippet<br>Frank E. Sims<br>Cross & Company | 1972<br>(514.25 Units) | Section 11 | $418,078.38 |
| | | Prejudgment interest | $2,179,828.36 plus $124.76 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Frank E. Sims<br>Cross & Company | 1972<br>(514.25 Units) | Rule 10b-5 | $418,078.38 |
| | | Prejudgment interest | $2,179,828.36 plus $124.76 per day from July 1, 1989 through the date of entry of this judgment |

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs in the following individual actions shall recover from the defendants listed below the following aggregate amounts (including, in the exercise of the Court's discretion, prejudgment interest in the amounts set forth below) on the following claims. The share of each plaintiff in the judgments set out below shall be as set forth in the applicable schedules attached to this judgement.

*Blesh, et al. v. Home-Stake Production Co., et al., Case No. 74-C-224.*

| Defendant(s) Liable | Program (No. of Units) | Claim | Amount |
|---|---|---|---|
| Robert S. Trippet | 1964 (10.5 Units) | Rule 10b-5 | $78,849.91 |
| | | Prejudgment interest | $259,017.73 plus $23.58 per day from July 1, 1989 through the date of entry of this judgment |
| Elmer M. Kunkel | 1964 (10.5 Units) | Negligence | $78,849.91 |
| | | Prejudgment interest | $259,017.73 plus $23.58 per day from July 1, 1989 through the date of entry of this judgment |

*Blesh, et al. v. Home-Stake Production Co., et al., Case No. 74-C-225.*

| Defendant(s) Liable | Program (No. of Units) | Claim | Amount |
|---|---|---|---|
| Robert S. Trippet | 1965 (31.71 Units) | Rule 10b-5 | $259,595.54 |
| | | Prejudgment interest | $927,460.15, plus $77.63 per day from July 1, 1989 through the date of entry of this judgment |
| Elmer M. Kunkel | 1965 (31.71 Units) | Negligence | $259,595.54 |
| | | Prejudgment interest | $927,460.15, plus $77.63 per day from July 1, 1989 through the date of entry of this judgment |

*Anton, et al. v. Home-Stake Production Co., et al., Case No. 74-C-226.*

| Defendant(s) Liable | Program (No. of Units) | Claim | Amount |
|---|---|---|---|
| Robert S. Trippet | 1966 (15 Units) | Rule 10b-5 | $141,300.06 |
| | | Prejudgment interest | $460,953.02, plus $42.25 per day from July 1, 1989 through the date of entry of this judgment |
| Elmer M. Kunkel | 1966 (15 Units) | Negligence | $141,300.06 |
| | | Prejudgment interest | $460,953.02, plus $42.25 per day from July 1, 1989 through the date of entry of this judgment |

*Anton, et al. v. Home-Stake Production Co., et al., Case No. 74-C-227.*

| Defendant(s) Liable | Program (No. of Units) | Claim | Amount |
|---|---|---|---|
| Robert S. Trippet | 1967 (1.5 Units) | Rule 10b-5 | $5,061.71 |
| | | Prejudgment interest | $40,175.37, plus $1.51 per day from July 1, 1989 through the date of entry of this judgment |

*Anderson, et al. v. Home-Stake Production Co., et al., Case No. 74-C-228.*

| Defendant(s) Liable | Program (No. of Units) | Claim | Amount |
|---|---|---|---|
| Robert S. Trippet | 1968 (3.2 Units) | Rule 10b-5 | $28,325.84 |
| | | Prejudgment interest | $91,622.58, plus $8.47 per day from July 1, 1989 through the date of entry of this judgment |

*Anderson, et al. v. Home-Stake Production Co., et al., Case No. 74-C-229.*

| Defendant(s) Liable | Program (No. of Units) | Claim | Amount |
|---|---|---|---|
| Robert S. Trippet | 1969 (2.5 Units) | Rule 10b-5 | $23,830.81 |
| | | Prejudgment interest | $74,513.28, plus $7.13 per day from July 1, 1989 through the date of entry of this judgment |
| Estate of Cross | 1969 (2.5 Units) | Negligence | $23,830.81 |
| | | Prejudgment interest | $74,513.28, plus $7.13 per day from July 1, 1989 through the date of entry of this judgment |

*Anderson, et al. v. Home-Stake Production Co., et al., Case No. 74-C-180.*

| Defendant(s) Liable | Program No. of Units) | Claim | Amount |
|---|---|---|---|
| Robert S. Trippet<br>Estate of Cross | 1970<br>(5 Units) | Rule 10b-5 | $39,344.09 |
| | | Prejudgment interest | $134,548.66, plus $11.76 per day from July 1, 1989 through the date of entry of this judgment |
| Robert S. Trippet<br>Elmer M. Kunkel<br>Estate of Cross | 1970<br>(5 Units) | Section 11 | $43,886.74 |
| | | Prejudgment interest | $141,680.41, plus $13.12 per day from July 1, 1989 through the date of entry of this judgment |
| Estate of Cross | 1970<br>(5 Units) | Negligence | $39,344.09 |
| | | Prejudgment interest | $134,548.66, plus $11.76 per day from July 1, 1989 through the date of entry of this judgment |

*Bank of America, et al. v. Home-Stake Production Co., et al., Case No. 74-C-230.*

| Defendant(s) Liable | Program (No. of Units) | Claim | Amount |
|---|---|---|---|
| Robert S. Trippet<br>Estate of Cross | 1971<br>(1 Unit) | Section 11 | $8,006.82 |
| | | Prejudgment interest | $28,424.57, plus $2.39 per day from July 1, 1989 through the date of entry of this judgment |
| Estate of Cross | 1971<br>(1 Unit) | Negligence | $6,383.25 |
| | | Prejudgment interest | $25,875.63, plus $1.91 per day from July 1, 1989 through the date of entry of this judgment |

As to each of the above judgments with respect to claims for which more than one defendant is listed as liable, such liability shall be joint and several among all the defendants so listed.

With respect to the plaintiffs' claims in the *Anixter* action under both Section 11 and Rule 10b-5 against defendants Trippet (for the 1964 through 1972 program units), Sims (for the 1972 program units), Kunkel (for the 1969 and 1970 program units), Norman C. Cross, Jr. (for the 1969 through 1971 program units), Cross & Company (for the 1972 program units) and Kothe & Eagleton, Inc. (for the 1971 program units), the foregoing judgments are, in part, duplicative. This Order shall not be construed to permit double recovery of damages from the same defendant for the same program units.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that there is no just reason for delay in entering the foregoing as final judgments in these cases and the Clerk is hereby directed to enter judgments against the above listed defendants in the amounts and on the claims specified herein. The Court retains jurisdiction to resolve all matters remaining undetermined in any of the cases consolidated in M.D.L. Docket No. 153, including but not limited to the proposed *Anixter* settlements with Kent M. Klineman and Marvin R. Barnett, approval of applications to distribute any amounts remaining undistributed from prior settlements in these actions and any applications that may be made regarding attorneys fees and expenses.

DATED: November 15, 1989

JUDGMENT ENTERED: /s/ _____
MANUEL L. REAL, Chief Judge
United States District Court
Central District of California

_____
Clerk

## APPENDIX H

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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**M.D.L. NO. 153**
**ALL CASES**

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IN RE:

HOME-STAKE PRODUCTION COMPANY
SECURITIES LITIGATION.

### SPECIAL JURY INTERROGATORIES
### EQUITABLE ESTOPPEL

Do you find that Robert S. Trippet, as President, Elmer M. Kunkel, as Chief Financial Officer, and other officers of Home-Stake Production Company intended to and did thwart and defeat the federal courts in their purpose to ensure the fair and proper administration of justice?

Yes _X_ No ____

Do you find that Robert S. Trippet, as President, Elmer M. Kunkel, as Chief Financial Officer, and other officers of Home-Stake Production Company intended to and did thwart and defeat the Securities Exchange Commission in its purpose of enforcing the securities laws of the United States?

Yes _X_ No ____

Do you find that Robert S. Trippet, as President, Elmer M. Kunkel, as Chief Financial Officer, and other officers of Home-Stake Production Company intended to and did thwart and defeat the Internal Revenue Service in its purpose of enforcing the internal revenue laws of the United States?

Yes X No ____

## APPENDIX I

## IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

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**M.D.L. NO. 153**
**73-C-382, 73-C-377**
**(Consolidated)**

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IN RE:

HOME-STAKE PRODUCTION COMPANY
SECURITIES LITIGATION.

### SPECIAL JURY INTERROGATORIES ON STATUTES OF LIMITATIONS

**Special Interrogatories:**
**1972, Rule 10b-5, Trippet**

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972,* that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972,* that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1972, Rule 10b-5, Sims**

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

**Special Interrogatories:**
**1972, Rule 10b-5, Cross & Co.**

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Cross & Company violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Cross & Company violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Cross & Company violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Cross & Company violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1971, Rule 10b-5, Trippet**

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

**Special Interrogatories:**
**1971, Rule 10b-5, Sims**

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor snould have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

**Special Interrogatories:**
**1971, Rule 10b-5, Kothe & Eagleton**

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Kothe & Eagleton violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Kothe & Eagleton violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Kothe & Eagleton violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

**Special Interrogatories:**
**1971, Rule 10b-5, Cross**

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

**Special Interrogatories:**
**1970, Rule 10b-5, Trippet**

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

**Special Interrogatories:**
**1970, Rule 10b-5, Cross**

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

**Special Interrogatories:**
**1970, Rule 10b-5, Sims**

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually

and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971,* that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1970, Rule 10b-5, Kunkel**

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

**Special Interrogatories:**
**1969, Rule 10b-5, Trippet**

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1969, Rule 10b-5, Sims**

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971,* that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1969, Rule 10b-5, Cross**

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Norman C. Cross, Jr. violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(Please turn to the next page)

**Special Interrogatories:**
**1969, Rule 10b-5, Kunkel**

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1968, Rule 10b-5, Trippet**

Do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1968, Rule 10b-5, Sims**

Do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page.
If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page.
If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page.
If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1967, Rule 10b-5, Trippet**

Do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1967, Rule 10b-5, Sims**

Do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1966, Rule 10b-5, Trippet**

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1966, Rule 10b-5, Sims**

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1966, Rule 10b-5, Kunkel**

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1965, Rule 10b-5, Trippet**

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1965, Rule 10b-5, Sims**

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1965, Rule 10b-5, Kunkel**

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1964, Rule 10b-5, Trippet**

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page.
If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page.
If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page.
If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1970*, that defendant Robert S. Trippet violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1964, Rule 10b-5, Sims**

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971*, that defendant Frank E. Sims violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1964, Rule 10b-5, Kunkel**

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until September 1973*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1972*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1971*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1971*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

Do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable

diligence, *until at least March 31, 1970*, that defendant Elmer M. Kunkel violated Rule 10b-5 or aided and abetted a violation of Rule 10b-5?

Yes _____ No _____

(Please turn to the next page)

**Special Interrogatories:**
**1972, Section 11, Trippet**

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1972 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least May 26, 1973*, that any part of the 1972 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1972, Section 11, Frank E. Sims and Donald C. Larrabee**

With respect to plaintiffs' claims against Frank E. Sims and Donald C. Larrabee under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1972 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Frank E. Sims and Donald C. Larrabee under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least May 26, 1973*, that any part of the 1972 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1972, Section 11, Cross & Company**

With respect to plaintiffs' claims against Cross & Company under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1972 Registration Statement prepared or certified by Cross & Company as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Cross & Company under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Joseph Bennett, individually and as representative of the 1972 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least May 26, 1973*, that the part of the 1972 Registration Statement prepared or certified by Cross & Company as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1971, Section 11, Trippet**

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1971 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1971 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1971, Section 11, Kothe & Eagleton, Inc.**

With respect to plaintiffs' claims against Kothe & Eagleton, Inc. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1971 Registration Statement prepared or certified by Kothe & Eagleton, Inc. as attorneys misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Kothe & Eagleton, Inc. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least May 26, 1973*, that any part of the 1971 Registration Statement prepared or certified by Kothe & Eagleton, Inc. as attorneys misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1971, Section 11, Norman C. Cross, Jr.**

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1971 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Beverly Warren, individually and as representative of the 1971 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1971 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1970, Section 11, Trippet and Kunkel**

With respect to plaintiffs' claims against Robert S. Trippet and Elmer Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1970 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet and Elmer Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1970 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1970, Section 11, Norman C. Cross, Jr.**

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that the part of the 1970 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Grohne, individually and as representative of the 1970 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that the part of the 1970 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1969, Section 11, Trippet and Kunkel**

With respect to plaintiffs' claims against Robert S. Trippet and Elmer Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1969 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet and Elmer Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1969 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1969, Section 11, Norman C. Cross, Jr.**

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that the part of the 1969 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Norman C. Cross, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Thomas Thorner, individually and as representative of the 1969 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that the part of the 1969 Registration Statement prepared or certified by Norman C. Cross as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)



**Special Interrogatories:**
**1968, Section 11, Trippet**

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1968 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Robertson, individually and as representative of the 1968 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1968 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1967, Section 11, Trippet**

With respect to plaintiffs' claims against Robert S. Trippet, Jr. under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1967 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Peter Luce, individually and as representative of the 1967 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1967 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1966, Section 11, Trippet**

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1966 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until at least March 31, 1972*, that any part of the 1966 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1966, Section 11, Elmer M. Kunkel**

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that the part of the 1966 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that Ted Westfall, individually and as representative of the 1966 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that the part of the 1966 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1965, Section 11, Trippet**

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1965 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that any part of the 1965 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1965, Section 11, Elmer M. Kunkel**

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that the part of the 1965 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that John Lockton, individually and as representative of the 1965 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that the part of the 1965 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(Please turn to next page)

**Special Interrogatories:**
**1964, Section 11, Trippet**

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that any part of the 1964 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes X No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that any part of the 1964 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Robert S. Trippet under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that any part of the 1964 Registration Statement misstated or omitted to state material facts in violation of Section 11?

Yes _____ No _____

(Please turn to next page)

**Special Interrogatories:**
**1964, Section 11, Elmer M. Kunkel**

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence *until September 1973* that the part of the 1964 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes _X_ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least May 26, 1973*, that the part of the 1964 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes ____ No ____

(If your answer was "yes", please go to the next page. If "no", please answer the next question.)

With respect to plaintiffs' claims against Elmer M. Kunkel under Section 11 of the Securities Act of 1933, do you find that plaintiffs have proved by a preponderance of the evidence that William Dennler, individually and as representative of the 1964 Class, did not discover nor should have discovered by the exercise of reasonable diligence, *until at least March 31, 1972*, that the part of the 1964 Registration Statement prepared or certified by Elmer M. Kunkel as an accountant misstated or omitted to state material facts in violation of Section 11?

Yes _____ No _____

(Please sign below)

_____

Dated: FOREPERSON

## APPENDIX J

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

### 1. AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

### 2. Section 11 of the Securities Act of 1933, as codified at 15 U.S.C. § 77k, provides:

**Persons possessing cause of action: persons liable**

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

**Persons exempt from liability upon proof of issues**

(b) Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof—

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to



act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert;

and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

**Standard of reasonableness**

(c) In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

**Effective date of registration statement with regard to underwriters**

(d) If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

**Measure of damages: undertaking for payment of costs**

(e) The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in

which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

**Joint and several liability**

(f) All or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

**Offering price to public as maximum amount recoverable**

(g) In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

**3. Section 13 of the Securities Act of 1933, as codified at 15 U.S.C. § 77m, provides:**

No action shall be maintained to enforce any liability created under section 77k or 77l(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(2) of this title more than three years after the sale.

**4. Section 9(e) of the Securities Exchange Act of 1934, as codified at 15 U.S.C. § 78i(e), provides:**

(e) Any person who willfully participates in any act or transaction in violation of subsection (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

**5. Section 10(b) of the Securities Exchange Act of 1934, as codified at 15 U.S.C. § 78j, provides:**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

**6. Section 476 of the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, 105 Stat. 2236, 2387 (1991), provides:**

The Securities Exchange Act of 1934 is amended by inserting after section 27 (15 U.S.C. 78aa) the following new section:

"SPECIAL PROVISION RELATING TO STATUTE OF LIMITATIONS ON PRIVATE CAUSES OF ACTION"

"Sec. 27A. (a) EFFECT ON PENDING CAUSES OF ACTION.—The limitation period for any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

"(b) EFFECT ON DISMISSED CAUSES OF ACTION.—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—

"(1) which was dismissed as time barred subsequent to June 19, 1991, and

> "(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section."

**7. SEC Rule 10b-5, 17 C.F.R. 240.10b-5, provides:**

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange.

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(2)

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No. 92-1003

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM H. DENNLER, et al.,

*Petitioners,*

v.

ROBERT S. TRIPPET, et al.,

*Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## RESPONDENTS' BRIEF IN OPPOSITION

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**WILLIAM H. DENNLER, et al.,**

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*Respondents.*

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

## RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully suggest that the Petition for a Writ of Certiorari[1] be denied for the reasons that (i) the petition was not timely filed, and (ii) the questions presented do not satisfy the standards of Rule 10.

## JURISDICTION

The December 11, 1992 Petition for a Writ of Certiorari was untimely filed and thus fails to invoke this Court's jurisdiction. Rule 13 and 28 U.S.C. §2101 require that a

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[1] On December 22, 1992, these Respondents filed a Petition for a Writ of Certiorari, *Cross v. Thorner*, No. 92-1099, requesting review of other issues arising from the same proceedings below.

petition for a writ of certiorari be filed within 90 days after the entry of the judgment for which review is sought. This 90-day time period is mandatory and jurisdictional in a civil case. *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Here, the petition was not filed within 90 days after the entry of the judgment which finally resolved the issues raised by the petition, and therefore, it was not timely and failed to invoke the jurisdiction of this Court. *See Fed. Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952).

Petitioners seek review of the Tenth Circuit's orders of July 22, 1991, and October 21, 1991 (the "1991 judgments"), which reversed the Section 11 judgments (App. 1a, 51a).[2] However, their petition was not filed until December 11, 1992, which is more than 90 days after the entry of the judgments they seek to have reviewed.

The appellate history of this case is complex. Petitioners obtained judgments in the trial court on both Section 10(b) and Section 11 claims. Following entry of judgments by the trial court, Respondents filed a timely appeal to the Tenth Circuit. The Respondents' appeal resulted in four opinions by the Tenth Circuit. The first two opinions, the 1991 judgments, addressed both the Section 10(b) and Section 11 claims. The final two opinions, rendered on August 24 and October 23, 1992 (the "1992 judgments"), addressed only the Section 10(b) judgments (App. 56a, 98a).

Each of the four opinions of the Tenth Circuit dealt with clearly distinguishable issues. On July 22, 1991, the Tenth Circuit reversed the Section 10(b) judgments and the Section 11 judgments because those claims were filed after

[2] "App." refers to the separately bound appendix filed by Petitioners and "Pet." refers to the petition herein.

the expiration of the applicable statutes of limitation and repose. Petitioners then sought a rehearing regarding the limitation periods applied by the court. On October 21, 1991, the Tenth Circuit clarified its earlier decision with regard to the applicable limitation period for the Section 10(b) claims, but otherwise denied the relief sought.

On December 19, 1991, the Securities Exchange Act of 1934 (the "1934 Act"), was amended by the addition of Section 27A (15 U.S.C. §78aa). This section pertains to dismissed and pending claims under Section 10(b) of the 1934 Act. Section 27A permits reinstatement of claims affected by the decision of this Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. ____, 111 S.Ct. 2773, *reh'g denied*, 112 S.Ct. 27 (1991).

On January 6, 1992, the Tenth Circuit, without comment, denied Petitioners' motion under Section 27A to recall the mandate and reinstate their Section 10(b) judgments. Petitioners then petitioned for a writ of certiorari, No. 91-1340, and presented three questions. The first question pertained to the reinstatement of the Section 10(b) judgments pursuant to Section 27A. The remaining two questions pertained to the Section 11 judgments and are identical to the questions in the petition herein. On April 20, 1992, this Court granted certiorari on the Section 27A issue (i.e., the Section 10(b) judgments) and remanded the case to the Tenth Circuit "for further consideration in light of Section 27A . . . ." *Dennler v. Trippet*, 112 S.Ct. 1658 (1992).

Following remand, Petitioners did not raise issues concerning the Section 11 judgments in the supplemental briefing. On August 24, 1992, the Tenth Circuit ruled that Section 27A was constitutional and reinstated Petitioners' Section 10(b) judgments. Referring to the order of August

24, 1992, Petitioners concede that "[t]he Tenth Circuit did not change those aspects of its earlier opinions which held petitioners' Section 11 claims all time-barred" (Pet. 11). These Respondents then petitioned for rehearing regarding the reinstatement of the Section 10(b) judgments, but did not raise issues pertaining to the dismissed Section 11 claims. On October 23, 1992, the Tenth Circuit ruled on various remaining issues, again unrelated to the dismissal of the Section 11 claims, but left the reinstatement of the Section 10(b) judgments undisturbed.

This Court in *Minneapolis-Honeywell* dismissed, for want of jurisdiction, a petition for a writ of certiorari filed within 90 days of a second order of the Seventh Circuit, but more than 90 days after an earlier order. The second order made no substantive change in the earlier order on the issue in question. In dismissing the writ of certiorari, this Court noted:

> Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower Court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

*Minneapolis-Honeywell*, 344 U.S. at 211-12 (footnotes omitted). *See also Dept. of Banking, State of Neb. v. Pink*, 317 U.S. 264, 266-67 (1942); *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20, *reh'g denied*, 344 U.S. 910 (1952).

The 1992 judgments of the Tenth Circuit in this case did not change any matter of substance regarding its 1991 judgments dismissing the Section 11 actions, nor was any ambiguity asserted regarding the 1991 dismissals. The 1992 judgments neither disturbed nor revised the legal rights and obligations of the parties relative to the Section 11 claims which the 1991 judgments had settled with finality. Consequently, the time for review of the Tenth Circuit's dismissal of the Section 11 claims began to run no later than the judgment of October 21, 1991, which clarified the July 22, 1991 dismissal of those claims.

This conclusion is not modified by Rule 13. Petitioners' jurisdictional statement relies upon the Tenth Circuit orders of September 10, 1992 and October 23, 1992 in an endeavor to establish the timeliness of their petition. The September 10th order neither addressed nor decided any matter fairly included in the questions presented by the Petition for Writ of Certiorari and, in any event, the petition was not filed within 90 days after September 10, 1992. The order dated October 23, 1992, also did not address or decide any matter fairly included in the questions presented by the Petition for Writ of Certiorari. Rule 13 extends the time to petition this Court for certiorari only when the petition for rehearing referenced by that rule raises a question relating to the issues to be appealed.

By its order of April 20, 1992, this Court directed the Tenth Circuit to reconsider its ruling regarding the Section 10(b) judgments, but did not also order the Tenth Circuit to reconsider its rulings regarding the Section 11 judgments. Petitioners did not petition this Court for rehearing on the Section 11 issues. In the absence of a petition for rehearing or an order of this Court remanding the Section 11 dismissals for reconsideration, neither the April 20, 1992 order of this Court nor the subsequent deci-

sions of the Tenth Circuit on other unrelated issues, preserved Petitioners' right to now raise these identical questions a second time.

The judgments, which resolved with finality the questions Petitioners present in the petition, were entered more than 90 days prior to the filing of the petition. Consequently, Petitioners have not properly invoked the jurisdiction of this Court to issue a writ of certiorari.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition involves Section 11 and Section 13 of the Securities Act of 1933 (15 U.S.C. §77k, §77m) ("the 1933 Act"), and the Seventh Amendment of the United States Constitution. Respondents invoke 28 U.S.C. §2101 and Supreme Court Rules 10 and 13.

## STATEMENT OF THE CASE

This counter statement is necessary to provide an understanding of the issues before this Court.

The Tenth Circuit's 1991 judgments dismissed the Section 11 claims solely upon the issue of the periods of limitation and repose under Section 13 of the 1933 Act (App. 1a, 51a).

Petitioners erroneously assert that the Tenth Circuit's decision pertaining to "inquiry notice" was based solely on the SEC enforcement action (Pet. i, 13-15). Rather, the court based its finding of "inquiry notice," as a matter of law, on the SEC fraud action and other significant facts in the record (App. 26a, 27a, 43a n. 36, 43-46a).

From 1964 through 1972, Home-Stake Production Company ("Home-Stake"), through its Program Operating Companies ("POCs"), offered units of participation in oil and gas drilling programs ("units") which were registered under the 1933 Act. Home-Stake's executives sold units in face-to-face transactions with sophisticated investors in the highest income tax brackets. Prospectuses were provided for the 1964-1972 Program years. In addition, program books, which described the drilling programs and the tax benefits being offered, were presented as a part of the sales literature for the 1964-1970 POCs.

Petitioners state that the Home-Stake "Ponzi scheme forms the basis of petitioners' case" (Pet. 15). There is no finding or evidence in the record that Home-Stake operated a "Ponzi scheme" to defraud investors.[3]

In their footnote 6, Petitioners also raise, for the first time, a claim that the non-class action cases dismissed by the Tenth Circuit in its July 22, 1991 order had not been appealed. To the contrary, the non-class issues were clearly set forth in the Tenth Circuit proceedings, first in Appellants' Joint Brief and again in the petition of Cross for rehearing. This issue has not been raised in any previous petition for writ of certiorari, is not raised by the questions in the current petition, and therefore cannot be fairly included in the questions presented for review.

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[3] During a hearing on January 26, 1990, the trial judge stated: "[W]hether this is a Ponzi scheme or not I did not determine. That's argument of counsel, it is not a factual situation . . . What counsel denominated it to be is something totally outside the record and irrelevant to me."

## REASONS FOR DENYING THE WRIT

Objections to the jurisdiction of this Court are included herein at pages 1-6. However, if this Court should determine that its jurisdiction has been properly invoked, then the petition should be denied for the reasons stated below, which were first set forth in Respondents' Brief in Opposition to Petition No. 91-1340, filed March 25, 1992.

### I.

### THE PETITION DEMONSTRATES NO CONFLICT AMONG THE CIRCUITS, IS BASED PRIMARILY UPON FACTUAL ISSUES AND PRESENTS NO IMPORTANT FEDERAL OR CONSTITUTIONAL ISSUES.

#### A. There Is No Conflict Between the Decision of the Tenth Circuit and the Decision of Any Other Circuit.

Petitioners' first question is limited to the application of the one-year limitation period of Section 13 to Petitioners' Section 11 claims. Petitioners erroneously contend that the 1991 judgments are in direct conflict with *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979) (Pet. 17-19). Petitioners misconstrue *Robertson* to hold that inquiry notice cannot be triggered by a "wholly distinct fraudulent scheme" (Pet. i, 17-19). To the contrary, the same circuit, in *Arneil v. Ramsey*, 550 F.2d 774, 781 (2d Cir. 1977), held that media coverage, regarding violations of the record keeping provisions of the securities laws, was sufficient to constitute inquiry notice of another independent fraud. *Robertson* does not overrule *Arneil*. *Robertson* discusses fraudulent concealment of a single underlying fraud. *Robertson*, 609 F.2d at 593.[4] Both the

[4] Petitioners argue that only the second SEC fraud suit put them on inquiry notice of these claims. Prior to Petition No. 91-1340,

(Footnote continued on following page)

case at bar and *Arneil* deal with two alleged independent, actionable frauds (Pet. 17). Therefore, *Robertson* is inapposite and not in conflict with the Tenth Circuit decision in this case.

### B. Petitioners' First Question Is Based Primarily Upon Factual Issues Fully Considered by the Tenth Circuit.

The Petitioners have drafted their first question very narrowly to imply that the Tenth Circuit resolved the question of "inquiry notice" solely on the effect of the rescission offer. This is not an accurate statement of the basis of the Tenth Circuit's holding.

Factors such as market conditions, legal actions, or adverse or contradictory information are sufficient to place an investor on inquiry notice and to commence the limitation period. *See Gaudin v. KDI Corp.*, 576 F.2d 708, 712 (6th Cir. 1978); *Berry Petroleum v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975); *Hupp v. Gray*, 500 F.2d 993, 996-97 (7th Cir. 1974); and *Arneil*, 550 F.2d at 781, all cited with approval in *Robertson*, 609 F.2d at 587-89. Furthermore, newspaper articles may be considered in determining inquiry notice. *Kennedy v. Tallant*, 710 F.2d 711, 716 (11th Cir. 1983); *Berry Petroleum*, 518 F.2d at 410. Finally, investor sophistication is a significant factor to be considered with regard to events sufficient to constitute inquiry notice. *Arneil*, 550 F.2d at 781; *Jones v. Ford Motor Co.*, 599 F.2d 394, 399 (10th Cir. 1979).

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[4] *continued*

Petitioners argued that it was a Wall Street Journal article reporting Home-Stake's filing for reorganization which put them on inquiry notice. Obviously, Petitioners have changed the event that they claim triggered inquiry notice for purposes of manufacturing a perceived conflict with *Robertson*, which does not exist.

Here, all of these factual elements supporting inquiry notice were in the record and were considered on appeal. The Tenth Circuit found, as a matter of law (App. 43a), that the investors in the 1970, 1971, and 1972 POCs were placed on inquiry notice more than one year before their Section 11 claims were filed by the following events: (1) on February 11, 1971, the SEC sued Home-Stake for fraud (App. 26a); (2) on February 16, 1971, the SEC fraud action was reported in the Wall Street Journal (App. 27a); (3) on April 30, 1971, the court-ordered rescission offer, which described the SEC fraud action, was mailed to the 1970 participants (App. 27a); (4) the 1971 and 1972 prospectuses described the SEC fraud action (App. 43a n. 36); and (5) the 1970, 1971,[5] and 1972 class representatives, all of whom were sophisticated investors, admitted knowledge of these facts (App. 43a-46a).

The record before the Tenth Circuit demonstrated the Petitioners' constructive knowledge of the alleged fraud from, *inter alia*: (1) the inconsistencies between the prospectuses and the program books regarding income projections; (2) the check stubs and tax summaries which described pro rev as income other than from oil and gas production; and (3) the annual summaries of the status of the development in the prior programs which clearly demonstrated inconsistencies between Home-Stake's projections and actual development. Even if Petitioners were not placed on inquiry notice on the dates of their investments as a result of the inconsistencies between the prospectuses and program books, they were on at least in-

[5] Warren, the 1971 class representative, invested in all the Home-Stake programs from 1964-1972, sold two units back to Home-Stake under his buy-back agreement in 1966 and 1967, and in 1971, received the Rescission Offer, which he rejected.

quiry notice from the date they received the first check stub or tax summary which reported most of the income as being from other than oil and gas production.

The voluntary payments which Petitioners refer to as the "Home-Stake fraud," were designated by Home-Stake as "pro rev" or "program revenue" payments. These payments were not represented by Home-Stake as income from oil and gas production, as Petitioners argue (Pet. 4, 24). Rather, they were represented as income from sources "other" than oil and gas production. Full disclosure of pro rev payments was made by Norman C. Cross, Jr. to the IRS, which approved and allowed pro rev payments as costs in the years that the payments were made. Home-Stake also disclosed the pro rev payments by stating in the 1971 Prospectus filed with the SEC:

> Cash returned to Investors includes funds derived from production and a return upon their capital contributions to the Programs as payment for the use of the contributed funds by Home-Stake . . . In the case of the 1965 to 1969 Programs, inclusive . . . funds derived from the latter sources have constituted virtually all of the net cash returned to Investors.

In December 1970, the SEC issued a formal Order of Investigation of the 1970 POC and, on February 11, 1971, filed a complaint in the district court charging Home-Stake, its officers and directors, and the 1970 POC with violation of the anti-fraud provisions of the federal securities laws. In April 1971, the Final Judgment of Permanent Injunction was entered. Furthermore, on April 30, 1971, the Rescission Offer Prospectus and a copy of the final judgment, describing the SEC fraud charges, were mailed to each of the investors in the 1970 POC. Two hundred seventy-nine investors accepted the rescission offer

and received the return of their investments, plus accrued interest.

The 1971 Prospectus, effective November 3, 1971, and the 1972 Prospectus, effective October 11, 1972, also disclosed details of the SEC fraud charges to the 1971 and 1972 investors. In addition, six lawsuits were filed between June 1971 and January 1973 by various investors alleging that Home-Stake had violated the anti-fraud provisions of the federal securities laws (App. 45a n. 39).

The Tenth Circuit held that these facts collectively constituted " 'great glowering clouds' . . . sufficient to put plaintiffs on notice that something was amiss" and were "enough of a 'storm warning' to start the clock as a matter of law" (App. 43a, 47a). The Tenth Circuit recognized that the three class representatives knew these facts, and noted that each admitted that they "made their own decisions based as much on tax considerations as investment concerns" (App. 44-46a).

Petitioners now ask this Court to find that constructive discovery could not have occurred prior to September, 1973 (Pet. 8). However, their suit for fraud was filed on March 30, 1973, *six months earlier*. Petitioners' argument that constructive discovery could first occur six months after actual discovery is incredible.

Independent of the question of when inquiry notice properly commenced, granting certiorari on the first question presented would also require this Court to consider an additional defect in the Petitioners' Section 11 claims, which arises from post-filing amendments to the class action complaints. The 1971 class claims against Kothe & Eagleton and the first claims by the 1972 class were added by amendment on May 24, 1974, more than one year after the original complaint in this action was filed and, therefore, are time-barred (App. 47a).

The existence of constructive discovery depends upon facts unique to each case. *Robertson*, 609 F.2d at 591. As this Court has recognized, it does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The question of when inquiry notice occurred is a fact-dependent issue peculiar to these Petitioners, and this Court "does [not] sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

### C. The Decision of the Tenth Circuit Does Not Violate the Seventh Amendment.

Petitioners state that the Tenth Circuit's holding as to when inquiry notice occurred as a matter of law "flies in the face of common sense . . . and improperly invades the province of the jury" (Pet. 16). If anything "flies in the face of common sense," it is the jury finding that constructive discovery of the fraud could not have occurred prior to September, 1973, which ignores the fact that Petitioners had actual knowledge of the fraud and had already filed their securities fraud claims six months earlier.

Based upon the whole record, the Tenth Circuit correctly concluded that "a single question of law predominates our review" (App. 24a). This Court has long recognized that "if the evidence is uncontradicted and raises only a question of law," there is no violation of the Seventh Amendment right to a jury trial when an appellate court reverses and directs entry of judgment. *Tull v. United States*, 481 U.S. 412, 419 (1987); *Neely v. Martin K. Eby Constr.*, 386 U.S. 317, 321-22, *reh'g denied*, 386 U.S. 1027 (1967).

There is no usurpation of a jury function, nor is there a violation of the Seventh Amendment, where the material facts are undisputed and the court establishes, as a mat-

ter of law, that a statute of limitations bars the action. *Curry v. A. H. Robins Co.*, 775 F.2d 212, 217 (7th Cir. 1985).

The Tenth Circuit was correct in setting aside the jury finding and applying the standards of review set forth in *Black, Sivalls & Bryson v. Keystone Steel Fabrication*, 584 F.2d 946, 951 (10th Cir. 1978), because "both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion." *Brady v. Southern R. Co.*, 320 U.S. 476, 479-80 (1943).

Petitioners also state that the Tenth Circuit's opinion conflicts with "well-established principles governing appellate review of jury verdicts in securities law cases," citing *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984) (Pet. 19). However, *Mosesian* recognized that a statute of limitations question may be decided as a matter of law "when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Mosesian*, 727 F.2d at 877, citing *Kramas v. Sec. Gas & Oil*, 672 F.2d 766, 770 (9th Cir.), *cert. denied*, 459 U.S. 1035 (1982). Petitioners have not and cannot identify a conflict among the circuits. The Ninth Circuit in *Mosesian* cited cases from the Sixth and Seventh Circuits holding that this question may be decided as a matter of law. 727 F.2d at 878. The outcome in *Mosesian* is distinguishable from this case because the Ninth Circuit, in reversing the judgment notwithstanding the verdict, held that the verdict was "reasonable and [was] supported by substantial evidence." 727 F.2d at 879. The facts here do not support a similar conclusion.

The power of any court, trial or appellate, to direct entry of judgment notwithstanding a verdict, without vio-

lating the Seventh Amendment, is well established. *Neely*, 386 U.S. at 322. *See also* 5A J. Moore, J. Lucas, *Moore's Federal Practice*, ¶50.07[1] at pp. 50-61 through 50-64 (2d ed. 1992), and the citations therein. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 360, 363-64, *reh'g denied*, 369 U.S. 882 (1962), and *Robertson*, 609 F.2d at 592, cited by Petitioners, are inapposite since the evidence relevant to the issue was controverted.

In conclusion, Petitioners' first issue does not raise any legal question on the appropriate standard for judgment notwithstanding the verdict, nor does it raise a constitutional question. Instead, this issue is fact-based, i.e., whether a review of the record establishes any material fact questions which would preclude an appellate court from entering judgment. Fact questions are not a basis for granting certiorari. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951).

## II.

## THE DECISION OF THE TENTH CIRCUIT WITH RESPECT TO SECTION 13 AND EQUITABLE ESTOPPEL IS NOT CONTRARY TO, NOR IN CONFLICT WITH, DECISIONS OF THIS COURT OR OTHER CIRCUITS.

This Court and the various circuits uniformly define equitable estoppel, as it relates to statutes of limitation, to require proof that a plaintiff knew of a cause of action and, because of reliance upon a defendant's subsequent conduct, failed to file the known cause of action in a timely manner. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959); *Aldrich v. McCulloch Properties*, 627 F.2d 1036, 1043 n. 7 (10th Cir. 1980); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988).

Petitioners ignore the distinction between equitable tolling and equitable estoppel to seek review of the Tenth Circuit holding (Pet. 21-22). The distinction is explained in *Cerbone v. Int'l Ladies Garment Workers' Union*, 768 F.2d 45, 49-50 (2d Cir. 1985):

> Unlike equitable tolling, which is involved in cases where the plaintiff is ignorant of his cause of action because of the defendant's fraudulent concealment, equitable estoppel is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay in bringing his lawsuit. (citations omitted)

The facts enumerated by Petitioners do not support the application of equitable estoppel. Petitioners have never argued that they knew of their claims but delayed filing suit in reliance upon any conduct or representations of the Respondents. Rather, Petitioners argue that the actions of some Respondents prevented them "from discovering" their claims (Pet. 24), that quarterly payments from other than oil and gas production were made "to conceal the absence of program development and the lack of profitable operations" (Pet. 24), and that the rescission offer prospectus constituted an act of "concealment" (Pet. 26). Thus, Petitioners tacitly acknowledge that the facts of this case do not give rise to equitable estoppel. Petitioners deny knowledge of their claims until six months after the suit was filed, and, therefore, they could not have been fraudulently induced to forego filing a known claim.

Petitioners apparently seek to misconstrue the distinction between equitable tolling and equitable estoppel, recognizing the fact that equitable tolling will not extend the three-year period of repose under Section 13. *Summer v. Land & Leisure*, 664 F.2d 965, 968 (5th Cir. Unit B

1981), *cert. denied sub nom. Arthur Young & Co. v. Summer*, 458 U.S. 1106 (1982); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1308 (9th Cir. 1982).

The Tenth Circuit correctly concluded that the 1964-1969 investors "were barred from suit by the three-year statute of repose" since the suit was not filed until March 30, 1973 (App. 39a). This conclusion is compelled by the plain language of Section 13 which states: "[i]n no event shall any such action be brought to enforce a liability created under section 11 . . . more than three years after the security was bona fide offered to the public." The phrase "in no event" means what it says. *See Short v. Belleville Shoe Mfg.*, 908 F.2d 1385, 1391-92 (7th Cir. 1990), *cert. denied*, 501 U.S. ____, 111 S.Ct. 2887 (1991). This Court acknowledged the significance of this language in Section 13 when it construed the three-year provision of Section 9(e) as a "period of repose" not subject to any "tolling principles." *Lampf*, 111 S.Ct. at 2781-82.

### A. There Is No Conflict Between the Decision of the Tenth Circuit and the Decisions of Any Other Circuit.

The Tenth Circuit's opinion is not in conflict with *Glus*, *Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978), *Katz v. Amos Treat & Co.*, 411 F.2d 1046 (2d Cir. 1969), or other cases cited by Petitioners (Pet. 23-24). Those cases each involved statements by defendants that caused the plaintiffs not to file suit, even though plaintiffs knew of their claims before the limitations period elapsed. The courts applied traditional standards of equitable estoppel.

All circuits which have considered the application of equitable estoppel to avoid the three-year limitation period of Section 13 have rejected the principle. *See Short*, 908

F.2d at 1391 (collecting cases). The Tenth Circuit's ruling is consistent with those decisions (App. 32a n. 15, 38-39a). Furthermore, as the Tenth Circuit noted, "*In re Home-Stake* is recognized in the treatises as the 'sole exception' to the three-year absolute bar under section 13" (App. 32a n. 15).

The statement by the Tenth Circuit that equitable estoppel is inapplicable "when the consequence operates to trump a clear outer limit intended by Congress" does not create the conflict claimed by Petitioners. The Tenth Circuit acknowledged that "there may be circumscribed settings in which the doctrine of equitable estoppel might apply to claims governed by Section 13" (App. 37a-38a). Harold S. Bloomenthal, relied upon by the Petitioners (Pet. 22, 23), has commented on the Tenth Circuit's opinion in this particular case, and has noted that the Tenth Circuit's rejection of equitable estoppel is not inappropriate, since

> the issue had been commingled at the trial level with the issue of equitable tolling, and what the jury was asked to decide on the equitable tolling issue was whether the defendants "intended to and did thwart and defeat" the federal courts, the IRS and the SEC, all of which has nothing to do with equitable estoppel.

Harold S. Bloomenthal, SECURITIES LAW HANDBOOK, 1056 (1991-92 ed.).

**B. Petitioners' Second Question on the Application of Equitable Estoppel is Uniquely Dependent Upon the Facts of Each Case.**

As noted in *Glus*, the application of equitable estoppel is to be determined upon the facts of each case. 359 U.S. at 234. The Tenth Circuit correctly held upon the facts

of this case that Respondents were not equitably estopped from asserting the statute of repose.

A review of the facts and evidence discloses a further defect in Petitioners' contentions. Petitioners' statement of the case imputes to all Respondents the conduct of every other defendant, regardless of when the conduct occurred, and regardless of whose conduct might be considered an act of estoppel. However, neither estoppel nor tolling operate vicariously against persons who are not parties or privy to the transactions from which the estoppel or tolling arose. *Eldred v. Bell Tel. Co.*, 119 U.S. 513 (1886); *Branson v. Wirth*, 84 U.S. (17 Wall.) 32 (1872); *Deery v. Cray*, 72 U.S. (5 Wall.) 795 (1866); *Volk v. D. A. Davidson & Co.*, 816 F.2d 1406 (9th Cir. 1987).

A grant of certiorari by this Court on the second question presented would require this Court to review the facts and evidence unique to the parties to these proceedings to determine if equitable estoppel has been properly rejected by the Tenth Circuit. The factual issues were fully considered by the Tenth Circuit and further review of such factual issues is not an appropriate basis for certiorari. *Pittsburgh*, 340 U.S. at 503; *Johnston*, 268 U.S. at 227.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 92-1003

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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WILLIAM H. DENNLER, *et al.*,
*Petitioners,*

v.

ROBERT S. TRIPPET, *et al.*,
*Respondents.*

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

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## REPLY BRIEF FOR THE PETITIONERS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

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**No. 92-1003**

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WILLIAM H. DENNLER, *et al.*,

*Petitioners,*

v.

ROBERT S. TRIPPET, *et al.*,

*Respondents.*

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

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## REPLY BRIEF FOR THE PETITIONERS

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1. In their brief in opposition, respondents[1] assert that this Court lacks jurisdiction to hear this case because the petition for a writ of certiorari was untimely because it "was not filed within 90 days after the entry of the judgment which finally resolved the issues raised by the petition" (Br. in Opp. 2, citing Sup. Ct. R. 13 and 28 U.S.C. § 2101). According to respondents, "the time for review of the Tenth Circuit's dismissal of the Section 11 claims began to run no later than the judgment of October 21, 1991, which clarified the July 22, 1991 dismissal of those claims" (*id.* at 5). This contention is frivolous.

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[1] Only respondents Cross, Cross & Company, Kothe & Eagleton and Kunkel have filed a brief in opposition. Respondents Trippet and Sims have filed no response to the petition for certiorari.

Respondents ignore the fact that petitioners filed a timely petition for certiorari seeking review of the Tenth Circuit's judgment of October 21, 1991, which raised issues with respect to *both* the claims under Section 10(b) of the 1934 Act *and* the claims under Section 11 of the 1933 Act.[2] On April 20, 1992, this Court issued an order granting the petition, vacating the judgment, and remanding the case to the Tenth Circuit "for further consideration in light of Section 27A of the Securities and Exchange Act of 1934." *Dennler v. Trippet*, 112 S.Ct. 1658 (1992). By granting the petition and vacating the Tenth Circuit's judgment without qualification, this Court necessarily vacated that judgment in its entirety—that is, the portion addressing the Section 11 issues as well as the portion addressing the Section 10(b) issues. Thus, the Tenth Circuit's judgment with respect to the Section 11 issues has never become "final" in any sense of the word.

It is well-established that this Court has jurisdiction to review an appellate court's decision rendered following a previous order granting certiorari, vacating the original appellate decision and remanding for reconsideration in light of intervening changes in the law. *See, e.g., Rush v. Savchuk*, 444 U.S. 320 (1980). And it is also clear that the scope of such a review is not limited to the grounds which were the basis of the appellate court's decision on remand. *E.g., Califano v. Yamasaki*, 442 U.S. 682 (1979).

In arguing that October 21, 1991, is the date from which the timeliness of petitioners' current petition for certiorari must be determined, respondents appear to be taking the position that this Court granted certiorari only with respect to the Tenth Circuit's ruling on petitioners' Section 10(b) claims and implicitly denied certiorari with respect to the balance of the Tenth Circuit's rulings (Opp. Br. 3) and, therefore, that this Court's action somehow consti-

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[2] *See* Petition For A Writ Of Certiorari, *Dennler v. Trippet*, No. 91-1340. That petition was filed on February 19, 1992, the date to which the time for filing had been extended by order of Justice White dated December 30, 1991.

tuted a final judgment on the merits against the validity of petitioners' Section 11 claims. There are at least three fallacies in that position. First, on its face, the Court's order neither denied certiorari on any issue nor limited its reversal of the Tenth Circuit's judgment in any way. Second, an order granting certiorari, vacating the judgment below and remanding the case for reconsideration does "not amount to a final determination on the merits". *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). Thirdly, even if the Court had expressly denied certiorari in its earlier order, such a denial does not constitute a decision on the merits and does not prevent the Court from later granting certiorari on the same issues, so long as the case remains pending. *E.g.*, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973).

There is no merit whatever to respondents' suggestion that this Court lacks jurisdiction because petitioners on remand from this Court did not request the Tenth Circuit to reconsider its prior Section 11 rulings. To begin with, the Tenth Circuit on remand directed the parties to file supplemental briefs "addressing the issue remanded to this Court by the Supreme Court"—namely, the Section 27A issue and no other issue (Order filed April 29, 1992). Moreover, the Tenth Circuit had previously rejected petitioners' argument on these issues and no intervening statutory change or judicial decision had occurred to support a request for reconsideration. In any event, it has been a long-standing general rule that this Court, when presented with a petition for writ of certiorari, has jurisdiction to consider all substantial federal questions presented in earlier stages of the litigation. *Urie v. Thompson*, 337 U.S. 163, 172-173 (1949). *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 316 (6th ed. 1986).[3]

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[3] The three cases cited by respondents in support of their jurisdictional argument (Br. in Opp. 4) are completely inapposite. In all of them the issue was whether the time for petitioning for certiorari began to run upon the entry of an initial adverse appellate decision or, instead, from the later entry of an order clarifying or modifying a part of the original decision. In two, *Federal Trade Commission v. Minneapolis-*

In sum, respondents have wholly failed to demonstrate that this Court lacks jurisdiction to consider the validity of the Tenth Circuit's reversal of petitioners' Section 11 judgments. The Section 11 issues presented here were raised in respondents' initial appeal to the Tenth Circuit, in petitioners' petition for rehearing before that court, and in petitioners' prior petition for certiorari timely filed on February 19, 1992. Nothing has occurred in the intervening time which would deprive this Court of jurisdiction to consider these issues. In effect, respondents contend that this Court forever deprived itself of jurisdiction to review the Tenth Circuit's Section 11 rulings by summarily disposing of the case in April of 1992 rather than granting plenary review at that time. That contention has no support either in precedent or in common sense.

2.a. As to the first question presented, respondents' effort (Br. in Opp. 8-9) to harmonize the Tenth Circuit's ruling on "inquiry notice" with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979), is wholly unpersuasive. Whether *Robertson* is characterized as involving fraudulent concealment of a single fraud or two independent frauds is immaterial. The key point is that the Second Circuit held in *Robertson* that the plaintiff's knowledge of an SEC action charging an

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*Honeywell Regulator Co.*, 344 U.S. 206 (1952), and *Department of Banking v. Pink*, 317 U.S. 264 (1942), this Court held that the petition for certiorari was untimely because the second appellate decision was neither the product of a timely petition for rehearing nor a substantive change in the original decision. In contrast, in *Federal Power Commission v. Idaho Power Co.*, 344 U.S. 17 (1952), this Court held a petition for certiorari from a second court of appeals decision substantively modifying a portion of its initial decision to be timely. None of them involved an intervening decision by this Court vacating the initial appellate decision and remanding the entire case to the lower court. To the extent the three cases are relevant at all here, the decision in *Idaho Power*, which held that the time to petition for certiorari runs from the entry of a second appellate decision which substantively modifies the first, supports petitioners' position here because the Tenth Circuit made major substantive revisions in its initial decision in this case (reinstating petitioners' Section 10(b) judgments against respondents) following the remand from this Court.

issuer's underwriters with market manipulation of the issuer's stock did not constitute inquiry notice, as a matter of law, of a separate fraud committed in preparing the issuer's financial statements (609 F.2d at 592). In direct contradiction, the Tenth Circuit has held that petitioners' knowledge of an SEC action charging a narrow range of violations in connection with Home-Stake's 1970 program—all of which violations were purportedly cured in a later rescission offer (Pet. 6, 16)—constituted inquiry notice, as a matter of law, to all 1970-1972 Program investors that Home-Stake and its subsidiaries were operating a wholly distinct fraudulent scheme involving the preparation and dissemination of false financial statements during 1964-1972.[4] The conflict between *Robertson* and this case is clear.[5]

b. Respondents' defense of the Tenth Circuit's holding that petitioners were put on inquiry notice of the Home-Stake fraud on April 30, 1971, by the mailing of the rescission offer (App. 47a), is notable more for what it omits than for what it says. What is omitted (Br. in Opp. 9-13) is any attempt to refute petitioners' showing (Pet. 13-17) that a reasonable investor would have regarded the court-approved rescission offer as both identifying and curing the limited violations previously alleged by the SEC. In-

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[4] Respondents are disingenuous in contending (Br. in Opp. 8 n.4) that petitioners have changed their position as to the event—the second SEC suit against Home-Stake, as opposed to Home-Stake's bankruptcy filing—that triggered inquiry notice. Both events took place in September 1973; the bankruptcy filing resulted from settlement of the SEC action (T. 3472); and both events were reported in the Wall Street Journal several days apart (App. 28a; T. 1757, 1765-66). The jury did not determine which event put petitioners on inquiry notice, but simply found that petitioners could not have discovered the Home-Stake fraud "until September 1973" (App. 78a-146a).

[5] Respondents' citation of *Arneil v. Ramsey*, 550 F.2d 774 (2d Cir. 1977), as somehow supporting the Tenth Circuit's decision here is wholly inapposite. In fact, by relying in part on the bankruptcy of the securities issuer as imparting notice to the plaintiffs, 550 F.2d at 781, *Arneil* is consistent with the jury's selection of September 1973 as the notice date in this case.

deed, that is precisely what the jury determined in finding that petitioners lacked notice of Home-Stake's Ponzi scheme until September 1973.

Instead of confronting the Tenth Circuit's fundamental error in treating this issue as one of law, respondents argue disputed evidentiary points which were decided against them at trial and neither addressed nor relied upon by the court of appeals. For example, respondents' theory that petitioners gained "constructive knowledge" of the Home-Stake fraud from asserted inconsistencies between projections in program books and prospectuses, from information allegedly derivable from check stubs and tax summaries, and from a footnote in the 1971 prospectus (Br. in Opp. 10-11), was rejected by the jury in answering special interrogatories (App. 78a-146a) and by the trial court in its order denying respondents' statute of limitations defenses (App. 57a-59a). Most importantly, the Tenth Circuit did not discuss, much less rely on, any of this "knowledge" in holding petitioners' 1933 Act claims time-barred by the one-year limitations period of Section 13 (App. 43a-47a).

Respondents attack as "incredible" the jury's finding that petitioners should not have discovered the fraud until September 1973, noting that the *Anixter* class action was filed six months earlier (Br. in Opp. 12). This is a red herring. As the Tenth Circuit noted, the primary issue is whether the *Anixter* complaint filed on March 30, 1973 is time-barred (App. 39a-40a, 47a), not whether September 1973 rather than March 30, 1973 is the appropriate notice date. There was no evidence at trial that any class representative or any member of the 1970-1972 investor classes (apart from Ivan Anixter himself) had knowledge prior to September 1973 of the filing of the *Anixter* action.[6] Thus, the jury's finding that the 1970-1972 class

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[6] Ivan Anixter, the original named plaintiff in this case, voluntarily dismissed with prejudice his Section 11 claim against the only respondent affected by the issue whether March 30, 1973 or September 1973 is the applicable notice date (Doc. 2709). Similarly, there is no evidence

members should not have discovered their claims prior to September 1973 is both reasonable and consistent with the Second Circuit's decision in *Robertson v. Seidman & Seidman*, 609 F.2d 583, 586, 591-92 (2d Cir. 1979) (plaintiff's knowledge of and involvement in prior action not determinative on notice issue).[7]

c. Respondents concede that, under the Seventh Amendment, an appellate court may properly reverse a jury verdict only where the material facts and the inferences to be drawn therefrom are either undisputed or point so strongly in favor of the appellant that reasonable persons could draw no other conclusion (Br. in Opp. 13-14). Moreover, in reviewing the evidence, this Court has held that courts of appeal are "bound to view the evidence in the light most favorable to [the prevailing party below] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962).

Even if one assumes *arguendo* the reasonableness of the inferences that the Tenth Circuit, in ruling against petitioners, drew from the 1971 SEC action and ensuing

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in the record of knowledge by any class representative or class member of the six prior suits against Home-Stake referred to by respondents (Br. in Opp. 12) and the Tenth Circuit did not rely on those suits in support of its ruling (App. 45a).

[7] The "additional defect" alleged by respondents to inhere in the claims first asserted by amendment in May 1974 by the 1971 class against respondent Kothe & Eagleton and by the 1972 class against respondent Cross & Company (Br. in Opp. 12) is only a variation on their "red herring" argument discussed in the text above. No 1971 or 1972 class representative or class member (other than Ivan Anixter who voluntarily dismissed his Section 11 claim against Kothe & Eagleton before trial) was shown to have any knowledge, or reason to know, of the March 30, 1973 filing of the *Anixter* action, or of the facts on which that action was based, prior to September 1973, as found by the jury (App. 129a, 131a). Accordingly, the Section 11 claims of those classes against Kothe & Eagleton and Cross & Company were timely when filed in May of 1974 under the one-year limitation period of Section 13.

rescission offer, respondents make no effort to show that the contrary inferences urged by petitioners (Pet. 15-17) are not ones that a reasonable jury could *also* draw. Absent such a showing, the Tenth Circuit's holding on the "inquiry notice" point constitutes a clear violation of the Seventh Amendment and of this Court's standards for appellate review of jury verdicts.

3. As to the second question presented, respondents contend that the doctrine of equitable estoppel does not apply here because its application is confined to situations where a defendant fraudulently induces a plaintiff to fail to file a known cause of action in a timely manner (Br. in Opp. 15-16). In so arguing, respondents seek to defend the Tenth Circuit's ruling on a ground different from that upon which the court itself relied. The court of appeals held that equitable estoppel is unavailable *per se* in any Section 13 case (App. 38a), not that the facts of this case do not warrant its application.[8]

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[8] Respondents assert that the "factual issues [relating to the application of equitable estoppel to the conduct of each respondent] were fully considered by the Tenth Circuit" (Br. in Opp. 19). This assertion is untrue. The Tenth Circuit neither discussed nor relied on any evidence of respondents' conduct in rejecting the trial court's application of equitable estoppel in this case (App. 32a-39a).

Respondents also assert (Br. in Opp. 17-18) that numerous circuits have rejected the application of equitable estoppel to Section 13, citing *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2887 (1991). In fact, other than dictum in *Short* itself, none of the cases cited in *Short* involved the application of equitable estoppel in a Section 13 action. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1308 (9th Cir. 1982) and *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 968 (5th Cir. Unit B 1981), *cert. denied*, 458 U.S. 1106 (1982) both involved equitable tolling not equitable estoppel. And *Darms v. McCulloch Oil Corp.*, 720 F.2d 490, 494 (8th Cir. 1983) and *Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1043 n.7 (10th Cir. 1980), interpreting the substantially identical three-year limitations period contained in the Interstate State Land Sales Full Disclosure Act, 15 U.S.C. § 1711 (1976) (amended 1979), stated that equitable estoppel could apply in a proper case.

More importantly, neither respondents nor the authorities they cite[9] suggest any reason why the principle behind equitable estoppel—"that no man may take advantage of his own wrong," *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-33 (1959)—should apply to revive a time-barred lawsuit where a plaintiff has been lulled into letting the statute of limitations run on a known cause of action, yet not apply where the plaintiff's failure to file a timely suit was procured by the defendant's active fraud in keeping the plaintiff ignorant of the relevant facts. In both situations the defendant has fraudulently obtained the benefit of a time bar by conduct separate and apart from the acts that gave rise to the original cause of action. Indeed, the defendant's fraud in the latter case seems more egregious because it is more complete: by keeping plaintiffs in the dark about the very *existence* of their cause of action, the defendant absolutely deprives them of any opportunity to sue. Neither the Tenth Circuit in this case nor the Seventh Circuit in *Short* has proffered any principled basis for invoking equitable estoppel in the circum-

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[9] Although citing Professor Bloomenthal for the proposition that the Tenth Circuit's rejection of equitable estoppel "is [sic] not inappropriate" (Br. in Opp. 18), respondents omit his subsequent statement that:

> Congress was not saying that a defendant by his own subsequent conduct could not extend the [three-year] period of limitations [in Section 13], and that is what the doctrine of equitable estoppel is all about. It is critical, however, to the application of such doctrine that it be triggered by something other than the events that constitute the basis for the claim for which Congress established the period of repose and that the triggering events reasonably caused the plaintiff to forbear asserting his claim . . . . The Tenth Circuit's decision in *Anixter*, as noted above, rejected the foregoing distinction.

H. Bloomenthal, *Securities Law Handbook* 1058 (1991-92 ed.)

Here the acts of fraudulent concealment committed by Home-Stake and respondents occurred subsequent to the filing of each misleading registration statement on which the Section 11 claims of each class were based and reasonably caused the class representatives and class members to forbear asserting their claims.

stances presented by *Glus*, yet not invoking that doctrine in circumstances like those here, which include a calculated pattern of fraud on the SEC and the district court which issued the 1971 consent injunction against Home-Stake, as well as on petitioners. *Compare Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944) (vacating a final judgment for fraud on the Patent Office and on the court of appeals).[10] This Court should grant certiorari to make clear that its decisions in *Glus* and *Hazel-Atlas* are not so limited.

## CONCLUSION

For these reasons and those stated in the petition, the petition for writ of certiorari should be granted.

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[10] *See* the discussion of the breadth of the equitable estoppel doctrine in Symons, *Pomeroy's Equity Jurisprudence* §§ 802-805 (5th ed. 1941). The necessity for fraudulent acts by a defendant that are separate and apart from the initial misrepresentations in the sale of a security is the answer to the Seventh Circuit's rhetorical question about the necessity for the three-year bar to be absolute. *Short* at 1391, quoted at App. 38a. Where the one-year period of Section 13 has not run because the plaintiff has no basis for discovering a misrepresentation or omission, the three-year statute of limitations will protect any defendant who has not actively and fraudulently concealed the misrepresentation or omission. *See* Johnson, *Securities Fraud and the Mirage of Repose*, 1992 Wis. L. Rev. 607, 664 (1992).

Respectfully submitted,


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